(10)

No. 05-11284 *** CAPITAL CASE ***

Title: Jalil Abdul-Kabir, fka Ted Calvin Cole, Petitioner

v.

Nathaniel Quarterman, Director, Texas Department of Criminal Justice, Correctional Institutions Division

Docketed: June 2, 2006

Lower Ct: United States Court of Appeals for the Fifth Circuit

Case Nos.: (01-10646)

Decision Date: March 17, 2006

Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
May 30 2006	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due July 3, 2006)
Jul 5 2006	Order extending time to file response to petition to and including July 17, 2006.
Jul 17 2006	Brief amici curiae of Deryl Madison, et al. filed.
Jul 17 2006	Brief of respondent Nathaniel Quarterman, Director, Texas Department of Criminal Justice, Correctional Institutions Division in opposition filed.
Jul 27 2006	DISTRIBUTED for Conference of September 25, 2006.
Aug 10 2006	Record Requested .
Aug 14 2006	Reply of petitioner Jalil Abdul-Kabir filed. (Distributed)
Aug 30 2006	Record received from the US Court of Appeals for the Fifth Circuit (one envelope).
Sep 13 2006	Record received from U.S.D.C. for Northern District of Texas. (2 boxes)
Sep 28 2006	DISTRIBUTED for Conference of October 13, 2006.
Oct 13 2006	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED and consolidated with No. 05-11287. A total of one hour is allotted for oral argument.
Oct 19 2006	Motion to appoint counsel filed by petitioners Jalil Abdul-Kabir. VIDED.
Oct 25 2006	Motion DISTRIBUTED for Conference of November 9, 2006.
Oct 31 2006	SET FOR ARGUMENT ON Wednesday, January 17 2007.
Nov 13 2006	Motion to appoint counsel filed by petitioner GRANTED. Robert C. Owen, Esquire of Austin, Texas is appointed to serve as counsel for the petitioner in this case.
Nov 27 2006	Brief amici curiae of Child Welfare League of America, et al. filed. VIDED.
Nov 27 2006	Brief of petitioner Jalil Abdul-Kabir filed.
Nov 27 2006	Brief amici curiae of American Academy of the Child and Adolescent Psychiatry, et al. filed. VIDED.

Nov 27 2006	Joint appendix filed.
Dec 4 2006	CIRCULATED.
Dec 14 2006	Motion to vacate and remand for further consideration in light of Nelson v. Quarterman, ___ F.3d___, 2006 WL 3592953 (5th Cir., December 12, 2006) (en banc). filed by petitioner Jalil Abdul-Kabir.
Dec 18 2006	Response of Quarterman in opposition to motion to vacate and remand filed.
Dec 20 2006	Motion DISTRIBUTED for Conference of January 5, 2007.
Dec 23 2006	Petitioner's reply to respondent's opposition to motion to vacate and remand filed.
Dec 27 2006	Supplemental letter to response in opposition to motion to vacate and remand. VIDED.
Dec 29 2006	Brief of respondent Nathaniel Quarterman, Director, Texas Department of Criminal Justice, Correctional Institutions Division filed. (Distributed)
Jan 8 2007	DISTRIBUTED for Conference of January 12, 2007.
Jan 9 2007	Reply of petitioner Jalil Abdul-Kabir filed. (Distributed)

(7)

05-11284

File Date 5/30/2006

Law Offices Of

Owen & Rountree

A Limited Liability Partnership

May 30, 2006

Office of the Clerk
Supreme Court of the United States
1 First Street NE
Washington, D.C. 20543
202-479-3031

VIA PRIORITY U.S. MAIL

Re: **Abdul-Kabir v. Dretke, No. _____**
(DEATH PENALTY CASE)

Dear Sir or Madam:

Enclosed for filing in the above-styled death penalty habeas corpus proceeding please find an original and ten (10) copies of Petitioner Jalil Abdul-Kabir's **Application for Leave to Proceed *In Forma Pauperis***, his **Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit** with accompanying **Appendices**, and the **Certificate of Service** confirming service of these pleading upon counsel for Respondent.

By copy of this letter, I am serving Respondent's counsel with copies of these pleadings.

Thanks very much for your kind assistance.

Sincerely,

Robert C. Owen
Counsel for Jalil Abdul-Kabir

cc: AAG Carla Eldred
Mr. Jalil Abdul-Kabir

P.O. Box 40428 ♦ Austin, Texas 78704

Tel. 512-804-2661 Fax 512-804-2685

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2005

JALIL ABDUL-KABIR,
Petitioner,

-v-

DOUG DRETKE, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,
Respondent.

APPLICATION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner JALIL ABDUL-KABIR, formerly known as Ted Calvin Cole, by counsel, respectfully asks leave to file the accompanying Petition for Writ of *Certiorari* to the United States Court of Appeals for the Fifth Circuit without prepayment of costs and to proceed *in forma pauperis*. Petitioner (using his former name) proceeded *in forma pauperis* in federal district court and on appeal, with counsel in both proceedings appointed under 21 U.S.C. § 848(q)(4)(B). *See* Sup. Ct. R. 39.

Respectfully submitted,

* Robert C. Owen
Texas Bar No. 15371950
OWEN & ROUNTREE, L.L.P.
P.O. Box 40428
Austin, Texas 78704
512-804-2661 (voice)
512-804-2685 (fax)

Raoul D. Schonemann
3774 Harrison Street
Oakland, California 94611
510-654-1192 (voice)
415-904-5635 (fax)

Jordan M. Steiker
727 East Dean Keeton St.
Austin, Texas 78705-3299
512-232-1346 (voice)

* Counsel of Record for Petitioner
Member, Supreme Court Bar

ATTORNEYS FOR
JALIL ABDUL-KABIR

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2005

JALIL ABDUL-KABIR,
Petitioner,

-v-

DOUG DRETKE, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent.

PETITION FOR WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

THIS IS A CAPITAL CASE.

RAOUL D. SCHONEMANN
3774 Harrison Street
Oakland, California 94611
(510) 654-1192
(415)904-5635 fax

*ROBERT C. OWEN
OWEN & ROUNTREE, L.L.P.
P.O. Box 40428
Austin, Texas 78704
(512) 804-2661
(512) 804-2685 fax

JORDAN M. STEIKER
727 E. Dean Keeton
Austin, Texas 78705
(512) 232-1346
(512) 232-2399 fax

* *Counsel of Record for Petitioner*
Member, Supreme Court Bar

QUESTIONS PRESENTED

CAPITAL CASE

1. Do the former Texas "special issue" capital sentencing jury instructions – which permit jurors to register only a "yes" or "no" answer to two questions, inquiring whether the defendant killed "deliberately" and probably would constitute a "continuing threat to society" – permit constitutionally adequate consideration of mitigating evidence about a defendant's mental impairment and childhood mistreatment and deprivation, in light of this Court's emphatic statement in Smith v. Texas, 543 U.S. 37, 48 (2004), that those same two questions "had little, if anything, to do with" Smith's evidence of mental impairment and childhood mistreatment)?

2. Do this Court's recent opinions in Penry v. Johnson, 532 U.S. 782 (2001) ("Penry II") and Smith, both of which require instructions that permit jurors to give "*full* consideration and *full* effect" to a defendant's mitigating evidence in choosing the appropriate sentence, preclude the Fifth Circuit from adhering to its prior decisions – antedating Penry II and Smith – that reject Penry error whenever the former special issues might have afforded some indirect consideration of the defendant's mitigating evidence?

3. Has the Fifth Circuit, in insisting that a defendant show as a predicate to relief under Penry that he suffers from a mental disorder that is severe, permanent or untreatable, simply resurrected the threshold test for "constitutional relevance" that this Court emphatically rejected in Tennard v. Dretke, 542 U.S. 274 (2004)?

4. Where the prosecution, as it did here, repeatedly implores jurors to "follow the law" and "do their duty" by answering the former Texas special issues on their own terms and abjuring any attempt to use their answers to effect an appropriate sentence, is it reasonably likely that jurors applied their instructions in a way that prevented them from fully considering and giving effect to the defendant's mitigating evidence?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINION BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

A. Procedural History 2

B. Facts Material to Consideration of the Questions Presented 3

C. How the Issue Was Raised and Decided Below 8

REASONS THE COURT SHOULD GRANT REVIEW 12

I. THE FIFTH CIRCUIT, THOUGH REPEATEDLY ACKNOWLEDING THAT ITS OWN DETERMINEDLY NARROW READING OF PENRY CONFLICTS WITH THIS COURT'S EXPLICIT EMBRACE OF A BROADER VIEW IN PENRY II AND SMITH V. TEXAS, HAS REFUSED TO YIELD TO THE LETTER OR THE SPIRIT OF THIS COURT'S DECISIONS 12

A. In A String Of Recent Decisions Including Petitioner's Case, The Fifth Circuit Has Refused To Acknowledge Or Follow This Court's Pronouncement In Smith That Evidence Of Childhood Abuse And Mistreatment, Like That Presented By Petitioner, "Has Little, If Anything, To Do With" The Former Texas Special Issues And Thus Requires Additional Instructions Beyond Those Narrow Inquiries 17

B. The Fifth Circuit's Post-Smith Practice of Reflexively Characterizing Mental Disorders Like Petitioner's As "Non-Permanent" – And Thus Allegedly Mitigating Under The "Future Dangerousness" Inquiry – Simply Resurrects As A *Per Se* Bar To Penry Relief The "Severity" Screening Test This Court Explicitly Rejected In Tennard 23

C. The Fifth Circuit's Penry Analysis Failed To Give Due Regard To The Fact That Here, As In Many Cases Tried Under The Pre-1991 Sentencing Statute, Prosecutors Repeatedly Sought To Exploit The Narrow Scope Of The Former Special Issues And Remind Jurors That They Were Duty-Bound To Answer Those Issues On Their Own Terms And Not To Achieve A Just Result In Light Of Petitioner's Mitigating Evidence 28

II. LEFT UNCHECKED, THE FIFTH CIRCUIT'S APPROACH WILL RESULT IN THE EXECUTION OF SCORES OF DEFENDANTS WHO WERE DENIED MEANINGFUL CONSIDERATION OF THEIR MITIGATING EVIDENCE 33

III. THE FIFTH CIRCUIT'S APPROACH IN THESE CASES, LIKE ITS ARTICULATION OF THE "SEVERITY" AND "NEXUS" TESTS, THREATENS TO UNDERMINE THE ROLE OF INDIVIDUALIZED SENTENCING IN ENSURING A LINK BETWEEN MORAL CULPABILITY AND CAPITAL SENTENCING VERDICTS 35

CONCLUSION AND PRAYER FOR RELIEF 38

TABLE OF AUTHORITIES

CASES

United States Supreme Court

Abdul-Kabir v. Dretke, 543 U.S. 985 (2004) 1

Boyde v. California, 494 U.S. 370 (1990) 28

Cole v. Texas, 499 U.S. 982 (1991) 2

Eddings v. Oklahoma, 455 U.S. 104 (1982) 17, 38

Johnson v. Texas, 509 U.S. 350 (1993) 9, 21

Nelson v. Dretke, 542 U.S. 934 (2004) 34

Penry v. Johnson, 532 U.S. 782 (2001) ..... *passim*

Penry v. Lynaugh, 492 U.S. 302 (1989) ..... *passim*

Ring v. Arizona, 536 U.S. 584 (2002) 38

Skipper v. South Carolina, 476 U.S. 1 (1986) 38

Smith v. Texas, 543 U.S. 37 (2004) ..... *passim*

Tennard v. Dretke, 542 U.S. 247 (2004) ..... *passim*

Tuilaepa v. California, 512 U.S. 967 (1994) 36

Williams v. Taylor, 529 U.S. 362 (2000) 22, 38

United States Courts of Appeals

Bower v. Dretke, 145 Fed. Appx. 879 (5th Cir. 2005)(unpublished) 34

Brewer v. Dretke, 442 F.3d 273 (5th Cir. 2006) 20, 25, 37

Chambers v. Dretke, 145 Fed. Appx. 468 (5th Cir. 2005)(unpublished) 34

Coble v. Dretke, 444 F.3d 345 (5th Cir. 2006) 20, 24, 25, 34

Cole v. Dretke, 443 F.3d 441 (5th Cir. 2006) 2, 11

Cole v. Dretke, 418 F.3d 494 (5th Cir. 2005) ..... *passim*

Cole v. Dretke, No. 01-10646 (5th Cir. 2004) (unpublished) 9

Cole v. Cockrell, No. 01-10646 (5th Cir. 2003) (unpublished) 9

Draughon v. Dretke, 427 F.3d 286 (5th Cir. 2005) 20

Jacobs v. Scott, 987 F.2d 1116 (5th Cir. 1993) 20

James v. Collins, 31 F.3d 1319 (5th Cir. 1994) 20

In re Kunkle, 398 F.3d 683 (5th Cir. 2005) 13, 15, 16

Lucas v. Johnson, 132 F.3d 1069 (5th Cir. 1998) 25, 26

Mines v. Dretke, 118 Fed. Appx. 806 (5th Cir. 2004)(unpublished) 34

Nelson v. Dretke, 442 F.3d 282 (5th Cir. 2006) 34

Nelson v. Dretke, 442 F.3d 912 (5th Cir. 2006) 34

Newton v. Dretke, 371 F.3d 250 (5th Cir. 2004) 20

Penry v. Johnson, 215 F.3d 504 (5th Cir. 2000) 11

Robertson v. Cockrell, 325 F.3d 243 (5th Cir. 2003) (*en banc*) 18, 19

Robison v. Johnson, 151 F.3d 256 (5th Cir. 1998) 25, 26

Smith (R.G.) v. Dretke, 422 F.3d 269 (5th Cir. 2005) 11

Tennard v. Dretke, 442 F.3d 240 (5th Cir. 2006) 11

Tennard v. Cockrell, 317 F.3d 476 (5th Cir. 2003) 11

Tennard v. Cockrell, 284 F.3d 591 (5th Cir. 2002) 11

United States District Courts

Cole v. Johnson, No. 6:00-CV-014C (N.D. Tex. 2001) (unpublished) 2

State Courts

Cole v. State, No. 70,401 (Tex. Crim. App. 1990) (unpublished) 2

Ex parte Cole, No. 41,674-01 (Tex. Crim. App. 1999) (unpublished) 2

Ex parte Smith, 185 S.W.3d 455 (Tex. Crim. App. 2006) 16

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Constitutional Provisions

U.S. Const., Amend. VIII ..... *passim*

U.S. Const., Amend. XIV 2

Federal Statutes

28 U.S.C. § 1254 2

28 U.S.C. § 2244 16

State Statutes and Rules

Tex Code. Crim. Proc., art. 37.071 (former version) 2

Tex. R. App. Proc. 34 3

MISCELLANEOUS AUTHORITIES

Oral Argument Transcripts

Transcript of Oral Argument, Tennard v. Dretke, No. 02-10038 ..... 33, 34

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2005

JALIL ABDUL-KABIR,
Petitioner,

-v-

DOUG DRETKE, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,
Respondent.

PETITION FOR WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Texas death row prisoner JALIL ABDUL-KABIR (hereafter "Petitioner"), formerly known as Ted Calvin Cole,[1] respectfully asks this Court to grant a writ of *certiorari* to review the judgment on remand of the United States Court of Appeals for the Fifth Circuit in his case.

OPINIONS BELOW

In November 2004, this Court granted *certiorari* in Petitioner's case and directed the Fifth Circuit to reconsider its denial of relief in light of Tennard v. Dretke, 542 U.S. 274 (2004). Abdul-Kabir v. Dretke, 543 U.S. 985 (2004). The court below adhered to its prior judgment on remand. Cole v. Dretke, 418 F.3d 494 (5th Cir. 2005) (attached as Appendix A). Rehearing *en banc* was

---

[1] All relevant court documents and records in this case refer to Petitioner by his former name, Ted Calvin Cole.

denied over dissent. Cole v. Dretke, 443 F.3d 441 (5th Cir. 2006) (attached as Appendix B). The District Court's unpublished memorandum opinion, Cole v. Johnson, No. 6:00-CV-014C (N.D. Tex., March 6, 2001), is attached as Appendix C.

JURISDICTION

The Fifth Circuit entered judgment on remand on July 22, 2005, and denied rehearing *en banc* on March 17, 2006. This Petition is timely filed. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment guarantee against cruel and unusual punishment, applicable against the States through the Fourteenth Amendment's due process clause, and the pre-1991 version of the Texas capital sentencing statute, Tex. Code Crim. Proc. art. 37.071. Appendix D contains the text of each.

STATEMENT OF THE CASE

A. Procedural History

On June 3, 1988, a Texas jury convicted Petitioner of capital murder for intentionally killing Raymond C. Richardson in the course of committing robbery. The following day, that jury returned affirmative answers to the two special issue questions submitted pursuant to former Tex. Code Crim. Proc. art. 37.071, and the court imposed the death penalty as mandated by that statute.

Petitioner's conviction and sentence were affirmed on appeal. Cole v. State, No. 70,401 (Tex. Crim. App., Sept. 26, 1990) (unpublished), *cert. denied*, Cole v. Texas, 499 U.S. 982 (1991). The state courts thereafter denied post-conviction relief. *Ex parte* Cole, No. 41,674-01 (Nov. 24, 1999) (unpublished).

Petitioner sought federal habeas relief, which the District Court denied. *See* Appendix C. Petitioner appealed; the Fifth Circuit affirmed. This Court vacated that judgment and remanded for further consideration in light of Tennard. The Fifth Circuit adhered to its prior decision and refused rehearing *en banc* over dissent. *See* Appendices A, B. This Petition follows.

B. Facts Material to Consideration of the Question Presented

Petitioner was convicted of killing Raymond C. Richardson during a robbery. Two others took part in the crime: Petitioner's step-brother Michael Hickey and Hickey's wife Christina, the victim's granddaughter. *See generally* RR XV at 417-461.[2] Immediately before the crime, the three were transients, "squatting" in an abandoned motel in San Angelo, Texas. RR XV at 422. On December 13, 1987, the trio went to Richardson's house and visited with him for a couple of hours. Id. at 439. At some point, while Richardson was unawares, Petitioner pushed him to the floor from behind; he then strangled him with a dog leash while sitting on his back. Id. at 442-445. Michael Hickey took all the cash in Richardson's wallet – twenty dollars – and the three spent it on food. Id. at 295, 298, 449. The next morning, the Hickeys surrendered to police and implicated themselves and Petitioner. Id. at 454.[3] By midafternoon, Petitioner had been arrested in Richardson's home and had confessed his own role in the crime. Id. at 292-299.

At the penalty phase, the jury heard evidence detailing how Petitioner was deprived, neglected, abandoned, and mistreated as a child, as well as expert testimony about how those

---

[2] We cite the transcript of testimony fromt Petitioner's trial as "R.R." ("Reporter's Record") and the pleadings, orders, etc., of the trial court as "C.R." ("Clerk's Record"). *See* Tex. R. App. Proc. 34 and notes and commentary thereto (defining "Clerk's Record" and "Reporter's Record").

[3] Christina Hickey eventually pleaded guilty and received a 40-year sentence for testifying against Petitioner. Michael Hickey, who did not testify, pleaded guilty and received a sentence of 60 years.

experiences had left him with lasting emotional and psychological scars. In addition, the jury heard expert testimony that Petitioner suffers likely neurological dysfunction that impairs his ability to control his impulses.

Petitioner's mother Nancy Doris Hickey described the trauma and despair that characterized her son's life. Mrs. Hickey was an alcoholic and her drinking made her unable to care for her children. RR XVII at 772. Shortly after Petitioner was born, his father was arrested for robbing a liquor store. Id. at 770. Before Petitioner was five years old, his father abandoned the family. Id. at 771. Mrs. Hickey vividly described Petitioner's last meeting with his father:

> The last time he saw his father, his father brought him to San Angelo. He had took him off to Abilene and brought him to San Angelo and dropped him off a block from where he thought I lived and said, "Your mother lives down in that block. Go find her," and drove off. That's the last time he [saw] his father.

Id. at 776. Petitioner did not see his father again for ten years. Id.

Mrs. Hickey told the jury that after Petitioner's father abandoned the family, she worked at a "beer joint for three dollars a day and had two kids to feed." Id. at 771. Unable to manage her life and to care for her children, she took them to Oklahoma to live with her parents. Id. Both Mrs. Hickey's parents were also alcoholics and they did not want her or the children to live with them. Id. Their house was eight miles outside town and Petitioner, then just five years old, was completely isolated from other children. The school buses did not run in that area and Mrs. Hickey's father refused to let her use his car to transport Petitioner to and from school. Id. Petitioner's mother therefore placed him in a church-run children's home. Id. at 772-73. Although Petitioner remained there for the next five years, his mother visited him only twice. Id.

Petitioner's aunt Barbara Ann Dean testified that when Petitioner visited her family on

holidays during the five years he lived away from his family in the children's home, he seemed incapable of expressing his feelings. Id. at 790. She added that Petitioner's father never visited him at all. Id.

Psychologist Jarvis Wright, Ph.D., who had spent more than ten hours interviewing and evaluating Petitioner on several different occasions, testified that Petitioner had endured a "very rugged, rough childhood." Id. at 806. In Dr. Wright's professional opinion, Petitioner showed evidence of having experienced "a bad, very painful background," and of continuing to endure great emotional pain as an adult. Id. at 807. Dr. Wright explained that Petitioner had "never felt loved and worthwhile in his life," and as a result experienced "terrific needs for nurturance" and suffered from a "fragmented personality" and "chronic depression." Id. at 807, 824-25. He also testified that Petitioner, while awaiting trial, was so "distressed" and "distraught" that he tried to kill himself by cutting his own throat. Id. at 806.

In addition to the undisputed evidence of childhood neglect and abandonment, Petitioner also presented evidence that he suffered from diminished impulse control. Id. at 809. Dr. Wright described Petitioner as "lack[ing] a great deal of impulse control," as a result of a combination of factors including "his history," "the pain in his life," and a likely "neurological dysfunction in the central nervous system." Id. at 808-09. The latter condition was indicated by Petitioner's results on a battery of psychological and neuropsychological tests administered by Dr. Wright prior to trial; on some such tests, Petitioner scored in the bottom five percent of the population. Id. at 802-805, 809, 815. Based on Petitioner's performance on those tests, as well as Dr. Wright's own observations of Petitioner under various circumstances, Dr. Wright concluded that Petitioner suffers from damage to his central nervous system which greatly diminishes his impulse control. Id. at 808, 811. As Dr.

Wright testified:

> Ted lacked a great deal of impulse control. And I think that's important in these tests I gave. . . . It indicates some central nervous damage or very likely central nervous damage. Combine that and all the other factors of Ted's background, all these other things, we're going to have an individual with some real problems with impulse control.

Id. at 808.

Dr. Wright testified that the combination of Petitioner's childhood history of neglect and abandonment and his neurological dysfunction had impaired Petitioner's judgment and his ability to control his behavior. Id. at 809. According to Dr. Wright, Petitioner learned to cope with reality by living most of his life in "fantasy." Id. at 810. He explained to the jury that Petitioner's early life experiences were so painful that he had erased memories of his childhood. Id. at 807. Dr. Wright summed up his opinion by saying that although Petitioner started life with "fantastic raw material," (*i.e.*, high native intelligence), the abandonment, neglect, and mistreatment Petitioner suffered as a child left his personality "very damaged" and "horribly" distorted. Id. at 812.

Dr. Wright predicted that Petitioner should eventually "burn out" and no longer constitute a threat to society. Id. at 807. In the meantime, however, because of Petitioner's lack of impulse control and the lasting emotional and psychological damage resulting from childhood mistreatment, Dr. Wright admitted that Petitioner would pose a threat until some point in time "years from now." Id. at 813; see also id. at 819 (admitting that Petitioner "absolutely" is more likely than the average person to "do something dangerous or antisocial or violent"), 809 (Petitioner "very often can't behave in another way" than to give rein to his impulses).

At closing argument, defense counsel was unable to articulate any straightforward way for the jury to find that Petitioner's troubled background and impulse control problems supported a "no"

answer to either of the narrowly circumscribed inquiries of the former Texas capital sentencing statute. Defense counsel nevertheless gamely appealed to the jury to consider the intuitive relevance of Petitioner's tumultuous life history in deciding the appropriate punishment:

> And from that point forward, he's had nothing but problems. He would go to live with his father and have problems. He's been rejected everywhere. The only peace he ever finds is in the penitentiary. And that's the only life he's ever known. He doesn't know how – how it is to live out on the street. He hasn't had the opportunity. And I'm not saying we give him the opportunity. I don't want to give him the opportunity. But on the other hand, it's not right to kill him just to show killing is wrong. It's not.
>
> Look at all the evidence again. . . . Think about it, read it, mull it over . . . and decide Ted's fate. But believe it or not, he is a human being . . . . Can we in all good conscience sentence him to death?

RR XVII at 881-883. Nowhere in his brief summation did defense counsel urge that the evidence could support a "no" answer to the "future dangerousness" question. Id. at 879-883.

The prosecutor responded that the jury was not making a choice to impose the death sentence upon Petitioner, but was simply called on to "answer those [special issue] questions correctly." Id. at 886. He vigorously reminded the jurors that they had "promised" during voir dire to answer the special issues "yes" if the State "met its burden of proof." Id. at 883. As the prosecutor summed up his plea:

> Future dangerousness? Yes. Society has a right to protect itself. And the time is now for you to do your duty; and that duty is to admit the State has met its burden of proof in this case and to answer special issue number one "yes," and special issue number two "yes." That's what the evidence points to beyond a reasonable doubt, what you heard on this stand, what you will see – what you see in the paperwork. The time has come to act, and the time is to answer – please, this is a serious thing, and I'm not going to make light of it. It's a time for you to consider it all and make that decision and answer those questions correctly. But the State suggests – strongly urges and points to the evidence – the answer is "yes" to both those special issues.

Id. at 885.

The jury, as the prosecutor understood, was limited to answering whether the murder was "deliberate" and whether Petitioner posed a "continuing threat" to society. It returned affirmative answers to both, mandating a death sentence. *See* Appendix D (pre-1991 Texas capital sentencing statute, requiring trial court to impose death when both questions answered "yes").

C. How The Issue Was Raised And Decided Below

Petitioner objected to the penalty-phase jury charge and proffered five separate instructions to permit the jury to consider his mitigating evidence. CR at 157, 159-163. All were refused. RR XVII at 856-57. The court also denied Petitioner's request that it define "deliberately," the key term in the first special issue. RR XVII at 857; *see also* Penry v. Lynaugh, 492 U.S. 302, 322-23 (1989) ("Penry I") (suggesting that defining "deliberately" might cure the defect in the former Texas scheme as applied to particular evidence). Citing Penry I, Petitioner challenged in state post-conviction proceedings the adequacy of the jury instructions in light of his mitigating evidence. The state court concluded that the generic testimony from Petitioner's experts – indicating that *all* offenders grow less dangerous as they age – provided the jury with an avenue for giving effect to Petitioner's destructive family background, impaired impulse control, and organic neurological dysfunction. It also relied on then-recent Texas and federal caselaw holding that "[such] mitigating evidence [as] alcoholism, drug abuse, bad family background, bipolar disorder, low I.Q., substance abuse, head injury, paranoid personality disorder and child abuse were sufficiently considered under the [pre-1991] special issues." *See* Appendix E (state court findings re: "Pendry [sic] claim").

On federal habeas review, the District Court rejected Petitioner's Penry I claim on two grounds. First, it applied the Fifth Circuit's "screening test" for identifying "constitutionally relevant mitigating evidence" later struck down by this Court in Tennard. Under that test, because Petitioner

could not show that his "criminal act was attributable to" a "uniquely severe permanent handicap with which [he was] burdened through no fault of his own," relief under Penry I was unavailable. Appendix C at 9-18. Even assuming Petitioner's mitigating evidence was constitutionally relevant, the District Court further reasoned, the evidence was beyond the jury's effective reach only if there existed "a reasonable likelihood that the jury would have found itself *foreclosed* from considering [it] in answering the special punishment issues." Id. at 10 (citing Johnson v. Texas, 509 U.S. 350, 368 (1993); emphasis added by District Court; internal quotation marks omitted); *see also* id. at 12 ("The defect identified in Penry was that the jury was prevented from giving *any* mitigating effect to the evidence"). Because under controlling Fifth Circuit precedent Petitioner's evidence "could be considered under either the deliberateness or the future dangerousness issues," the District Court denied relief. Id. at 16.

The court below agreed with the District Court, initially denying Petitioner a COA on this claim because none of Petitioner's mitigating evidence satisfied the Fifth Circuit's rigid "constitutional relevance" test. Cole v. Cockrell, No. 01-10646 (5th Cir. 2003) (unpublished) at 5-6. A few weeks later, this Court granted review in Smith v. Dretke, No. 02-11309, and Tennard v. Dretke, No. 02-10038, both cases involving the Fifth Circuit's application of Penry. In light of those developments, Petitioner moved the Fifth Circuit to reconsider its denial of COA on his Penry I claim. In its eventual opinion disposing of the rest of Petitioner's claims, the court below refused to reconsider the COA denial on his Penry claim. Cole v. Dretke, No. 01-10646 (5th Cir. 2004) (unpublished), Petitioner sought review in this Court, which granted *certiorari*, vacated the Fifth Circuit's judgment, and remanded for reconsideration in light of Tennard.

On remand, the Fifth Circuit endorsed as a reasonable application of Penry I the state courts'

conclusion that the jury was able to express its reasoned moral response to Petitioner's mitigating evidence – which showed that his "very rough childhood" of neglect and abandonment left him with lasting emotional and psychological damage, including impaired impulse control – through its answers to the bare "deliberateness" and "future dangerousness" queries of the pre-1991 Texas sentencing statute. The court below began from the premise that Johnson "confirmed the limited scope of Penry I and II," by imposing the requirement that a defendant seeking relief under Penry show that his jury was altogether foreclosed from giving *any* mitigating effect to his evidence. Cole, 418 F.3d at 505 (defendant must show that his jury "was unable to give any effect" to his evidence).[4] It concluded that "the mitigating evidence of [Petitioner's] destructive family background and organic neurological deficiency falls outside of Penry's holding" because "[t]he record does not suggest that the jury viewed [Petitioner's] mitigating evidence as an aggravating factor only, *i.e.*, because he cannot learn from his mistakes, he will remain a danger in the future." Id. at 505, 506-07.

The Fifth Circuit also emphasized that Petitioner's own experts had testified that all offenders tend to "burn out" and become less violent around age "forty-five" or "fifty," and asserted that the jurors could have reasoned their way from that generic testimony to a "no" answer to the future dangerousness question. Id. at 506-07.[5] The panel did not address the significance of the fact that Petitioner's own experts also testified that Petitioner was presently dangerous and would remain so

[4] The panel did not acknowledge, much less distinguish, this Court's statement in Tennard, 542 U.S. at 288, that a Penry violation might occur even when the jury was able to give some mitigating effect to a defendant's evidence in answering the special issue questions. Nor did it explain how Johnson could "confirm" anything about the scope of Penry II, given that this Court decided Johnson eight years before Penry II.

[5] Petitioner was 31 years old at the time of trial, so this prediction cast him as a "continuing threat" for at least the next 10-15 years in the future.

for "years" to come. *See supra*. Nor did the panel take account of any of the context of the proceedings (*e.g.*, the *voir dire* or closing arguments) in assessing how the jurors would likely have understood their range of discretion in answering the special issues.

Petitioner sought rehearing *en banc*, which was denied over the dissent of Judge Dennis. Cole v. Dretke, 443 F.3d 441 (5th Cir. 2006). He pointed out that "[t]he panel's decision erroneously denigrates the pertinent clearly established Supreme Court jurisprudence of Penry I, McKoy, and Boyde specifically highlighted in Tennard and Smith and perpetuates the misinterpretation of Johnson v. Texas and Graham v. Collins as our circuit precedent." Id. at 443. He challenged what he described as the panel's creation of "another Fifth Circuit gloss upon a Supreme Court decision," *i.e.*, "restricting the principles articulated by Penry" to cases involving mitigating evidence which under the pre-1991 statute had a "purely aggravating" effect. Id. at 442. He added that the panel's expansive interpretation of Johnson would "lead[] to many inexplicable inconsistencies," including the fact that "Justice Kennedy, Johnson's author, [thereafter] silently and fully joined in all subsequent opinions by Justice O'Connor in which she forcefully reaffirmed the view of Lockett, Eddings, and Penry I that the principles set forth therein apply to any relevant evidence or factor that might tend to have a mitigat[ing] effect upon the capital sentencer's decision ..., *e.g.*, Penry II and Tennard."[6] Id. at 450-51.

---

[6] Judge Dennis has consistently anticipated this Court's view of the scope of Penry I and Penry II. He foresaw this Court's reversal of Penry's second death sentence in Penry II. *See* Penry v. Johnson, 215 F.3d 504, 514 (5th Cir. 2000) (Dennis, J., dissenting) (arguing for relief because "[t]he jury was not clearly and directly instructed that it could consider and give effect to [Penry's] mitigating evidence ... as a whole and beyond the scope of the special issues by declining to impose the death penalty."). Judge Dennis also dissented twice in Tennard before his view was validated by this Court. Tennard v. Cockrell, 284 F.3d 591, 597 (5th Cir. 2002); Tennard v. Cockrell, 317 F.3d 476 (5th Cir. 2003).

REASONS THE COURT SHOULD GRANT REVIEW

I. THE FIFTH CIRCUIT, THOUGH REPEATEDLY ACKNOWLEDGING THAT ITS OWN DETERMINEDLY NARROW READING OF PENRY CONFLICTS WITH THIS COURT'S EXPLICIT EMBRACE OF A BROADER VIEW IN PENRY II AND SMITH V. TEXAS, 543 U.S. 37 (2004), HAS REFUSED TO YIELD TO THE LETTER OR THE SPIRIT OF THIS COURT'S DECISIONS.

Since 2001, this Court has issued three decisions addressing as-applied challenges to the pre-1991 Texas capital sentencing statute: Penry v. Johnson, 532 U.S. 782, 797 (2001) ("Penry II"), Tennard, and Smith v. Texas, 543 U.S. 37 (2004) (*per curiam*). Taken together, these three decisions provide detailed doctrinal and practical guidance regarding the Eighth Amendment guarantee of individualized sentencing in the context of that statute. First, the Court twice described the test to be applied: a capital sentencing jury's instructions are "constitutionally inadequate" unless they "allow the jury to give *full* consideration and *full* effect to mitigating circumstances in choosing the defendant's appropriate sentence." Smith, 543 U.S. at 38 (emphasis in original) (citing Penry II, 532 U.S. at 797).[7] Second, the Court modeled the application of that test in a case involving a nineteen-year-old defendant with potentially organic learning disabilities and speech handicaps, an IQ of 78 and a history of special education classes, "exemplary" behavior in school despite the low IQ and learning disabilities, and a drug-addicted father who was involved with gang violence and stole from the family to buy drugs. *See* Smith, 543 U.S. at 41. As this Court explained, the bare "deliberateness" and "future dangerousness" questions of the former Texas statute were inadequate

[7] Between Penry II and Smith, this Court decided Tennard; although the "*full* effect" language does not appear in the majority opinion in Tennard, the late Chief Justice Rehnquist's *dissenting* opinion in Tennard is premised on the theory that permitting jurors to give "some effect" to mitigating evidence would satisfy the Eighth Amendment. *See Tennard*, 542 U.S. at 290-92 (Rehnquist, C.J., dissenting). Tennard thus stands firmly in line with Penry II and Smith in rejecting anything less

to permit the jury to give "*full* effect" to such mitigating evidence because the jury's consideration of that evidence was "tied to findings of deliberateness and future dangerousness that had had little, if anything, to do with the mitigation evidence petitioner presented." Id. at 48. Smith thus provided a sensible analysis for determining when the former Texas statute required supplemental instructions to satisfy Penry I. This Court issued its opinion in Smith in November, 2004.

Since then, however, the Fifth Circuit has consistently and repeatedly challenged whether this Court meant what it straightforwardly said in Smith. In its very first opinion citing Smith, written only a few weeks after that opinion was handed down, the Fifth Circuit implicitly acknowledged the likelihood that its own caselaw narrowly interpreting Penry I did not survive Smith – but turned the tables by suggesting that it was up to *this Court* to make yet another statement of its intent to adopt a broad reading of Penry I:

> Any reading of Smith as not being limited to mental impairment but rather reaching all types of mitigating evidence ... is inconsistent with [Jurek v. Texas, 428 U.S. 262 (1976); Graham v. Collins, 506 U.S 461 (1993); and Johnson v. Texas, 509 U.S. 350 (1993)]. We are not persuaded that the Court intended to undercut Jurek, Graham, and Johnson without even citing them. Whether Tennard or Smith sweep so broadly as to create a conflict with its own Jurek or Graham decisions is for the Supreme Court.

In re Kunkle, 398 F.3d 683, 685 (5th Cir. 2005). Contrary to this reasoning, this Court's decision in Smith could not fairly be read as "limited to [mitigating evidence of] mental impairment" or as preserving prior Fifth Circuit doctrine restricting the scope of Penry. First, in reversing Smith's death sentence, this Court made no suggestion that Smith's mental impairment was uniquely relevant to the outcome. Second, this Court referred to the totality of Smith's mitigating evidence when it declared that the inquiries of the special issues had "little, if anything, to do with" his evidence.

---

than "*full* consideration and *full* effect."

Smith, 543 U.S. at 48. Finally, this Court did not fail to cite Johnson in clarifying its limited reach; instead, both Penry II and Smith invoke the "*full* consideration and *full* effect" standard set forth in Justice O'Connor's **dissenting** opinion in Johnson.

A few months later, the Fifth Circuit more openly acknowledged its ongoing struggle to reconcile its own narrow reading of Penry I with the evident import of Penry II and Smith. In R.G. Smith v. Dretke, 422 F.3d 269 (5th Cir. 2005), the court below weighed whether to grant a COA on a Penry claim premised on mitigating evidence of "an impoverished background, growing up in a crime-infested environment and alcohol abuse," given "this Circuit's prior jurisprudence [holding that such evidence] can all be given effect through both the deliberateness and future dangerousness special issue questions." R.G. Smith, 422 F.3d at 285-86. Even as it reluctantly granted COA, the Fifth Circuit warned that Kunkle was "another hurdle" to relief on the merits (*i.e.*, "another hurdle" in addition to the Fifth Circuit's own pre-Smith caselaw), pointing out that Kunkle's reasoning would require evidence of mental impairment. Id. at 287. At the same time, however, the R.G. Smith panel conceded that this limitation was "the exact opposite" of what this Court said in Smith:

> We note that the Supreme Court has never explicitly stated that Penry claims cannot be extended beyond claims involving evidence of "mental impairment." In fact at times, it seems the Court has said the exact opposite. For example, in Smith v. Texas, the defendant put forward evidence of (1) organic learning disabilities and speech handicaps; (2) verbal IQ score of 75 and a full IQ score of 78; (3) his exemplary behavior at school despite his learning disabilities; (4) the involvement of his father with drugs and gang violence; and (5) Smith's young age of nineteen at the time he committed the crime. In granting his Penry claim, the Supreme Court did not in any way highlight any particular piece of Smith's evidence. The only mention the Smith Court made of whether the defendant's evidence was outside the reach of the special issue questions was the Court's single sentence that "[j]ust as in Penry II, petitioner's jury was required by law to answer a verdict form that made no mention whatsoever of mitigation evidence. And just as in Penry II, the burden of proof on the State was tied by law to findings of deliberateness and future dangerousness that had little, if anything, to do with the mitigation evidence petitioner presented."

Id. at 287 n.8 (citation omitted). Having acknowledged the tension between the Fifth Circuit's own decisions and this Court's, however, the R.G. Smith panel went no further towards resolving it.

In a third decision, handed down on March 1 of this year, the Fifth Circuit again conceded that "tension" exists between the "some effect" standard consistently applied in its own decisions and the emphatic "*full* consideration and *full* effect" standard declared by Penry II and Smith. This Court had remanded Tennard v. Dretke after concluding that the Fifth Circuit erred in relying on its baseless "constitutional relevance" doctrine to deny COA on Tennard's Penry I claim. On remand, the Fifth Circuit first traced the history of this Court's treatment of challenges to the former Texas capital sentencing scheme. *See* Tennard v. Dretke, 442 F.3d 240, 246-252 (5th Cir. 2006). It then acknowledged that this Court's unmistakably clear language in Smith is "in tension with ... Graham and Johnson:"

> In Smith v. Texas, the Court indicated that capital sentencing procedures are constitutionally infirm whenever they do 'not allow the jury to give "*full* consideration and *full* effect to mitigating circumstances" in choosing the defendant's appropriate sentence.' ... This language, which originated in Justice O'Connor's Johnson v. Texas dissent, may be in tension with Jurek and its progeny, particularly Graham and Johnson.

Id. at 253 n.17 (citations omitted). As it had in R.G. Smith, however, the Fifth Circuit in Tennard discounted the need to resolve that tension, breezily announcing that it would "leave it to other[s] to tidy the High Court's Augean stables." Id.

It is plain that Kunkle's bold challenge to this Court's decision in Smith, though technically *dicta*[8], presaged what has become the Fifth Circuit's refusal to embrace the reading of Penry

[8] Kunkle involved a successive application for federal habeas relief. Thus, the key question for the Fifth Circuit was whether Tennard and/or Smith announced a "previously unavailable" rule of law

articulated in Smith. The Fifth Circuit now essentially acknowledges that to the extent this Court demands that jury instructions permit *all* mitigating evidence to be given "*full* consideration and *full* effect," in the plain language of Penry II and Smith, such a requirement represents "the exact opposite" of the Fifth Circuit's own view, which insists on the primacy of Johnson and endorses instructions so long as they do not altogether *prevent* evidence from being taken into account, however tangentially. In no case, however, has the Fifth Circuit confronted the implications of the fact that both Penry II and Smith cite Justice O'Connor's dissenting opinion in Johnson as stating the standard for assessing whether jury instructions permit robust individualized consideration of a defendant's proffered mitigating circumstances.

Moreover, the Texas Court of Criminal Appeals ("CCA"), has stated that it, too, is "uncertain as to the Supreme Court's current Penry II jurisprudence." *Ex parte* Smith, 185 S.W.3d 455 (Tex. Crim. App. 2006) (denying Penry relief on remand from this Court). The CCA recognizes that "numerous post-Smith, post-Tennard Fifth Circuit cases have held that mitigating evidence [like that at issue in Smith] is fully encompassed by the Texas 'future dangerousness' or 'deliberation' special issues." Id. at 466 and n.35. This Court should grant review in Petitioner's case to conclusively resolve the "uncertainty" that troubles the CCA, as well as the "tension" the Fifth Circuit concedes to exist between its cases and this Court's most recent opinions interpreting Penry.

Despite the clarity of the guidance this Court has previously provided the Fifth Circuit and the Texas courts on comparable questions, this Court's intervention is once again necessary to

---

retroactively applicable on collateral review. *See* 28 U.S.C. § 2244(b)(2). The court answered this question in the negative. Kunkle, 398 F.3d at 684-85. It proceeded to discuss the merits of Kunkle's Penry I claim in an alternative holding, where it expressed the view that a literal reading of Smith would collide with Jurek, Graham, and Johnson.

resolve once and for all the enduring confusion in the courts below regarding the scope of Penry. The Fifth Circuit, while acknowledging that "tension" exists between its own decisions and those of this Court, refuses to abandon its own pre-Penry II, pre-Smith caselaw. Absent correction, the Fifth Circuit will evidently continue to maintain that jurors limited to answering whether a killing was "deliberate" and whether the defendant might be dangerous in the future could somehow express in those answers their reasoned moral response to mitigating evidence like Petitioner's history of a destructive family background, the severe emotional and psychological scars he suffered as a result, and his neurological dysfunction and impaired impulse control. That reasoning is squarely irreconcilable with Smith, and this Court should grant review and say so.

A. IN A STRING OF RECENT DECISIONS INCLUDING PETITIONER'S CASE, THE FIFTH CIRCUIT HAS REFUSED TO ACKNOWLEDGE OR FOLLOW THIS COURT'S PRONOUNCEMENT IN SMITH THAT EVIDENCE OF CHILDHOOD DEPRIVATION AND ABUSE, LIKE THAT PRESENTED BY PETITIONER, "HAS LITTLE, IF ANYTHING, TO DO WITH" THE FORMER TEXAS SPECIAL ISSUES AND THUS REQUIRES ADDITIONAL INSTRUCTIONS BEYOND THOSE NARROW INQUIRIES.

As noted, Petitioner presented extensive evidence that he was neglected, abandoned, and mistreated as a child, including evidence that one parent was an alcoholic and the other a criminal. *Cf.* Smith, 543 U.S. at 41 (describing mitigating evidence that defendant's father was addicted to drugs and involved in criminal violence). It is well-settled that this evidence could reasonably serve as the basis for a life sentence. *See, e.g.*, Eddings v. Oklahoma, 455 U.S. 104, 115 (1982) (defendant's "turbulent family history" was "relevant mitigating evidence"). More important, this Court confirmed in Smith that such evidence about the deprived circumstances of a defendant's background "*has little, if anything, to do with*" the deliberateness of the crime *or* the likelihood that

the defendant poses a "continuing threat to society." Smith, 543 U.S. at 48 (emphasis added). For that reason, its mitigating value falls "beyond the scope" of those questions, requiring additional instructions to place the evidence fully within the jury's reach. *See* Penry I, 492 U.S. at 321-22.

Not only do the relevant mitigating qualities of such evidence "have little ... to do with" the probability that the defendant will be dangerous in the future, but evidence of a defendant's deprived background generally bears an *aggravating* relationship to his prospects for non-violent behavior in the future. Common sense teaches that an adult who spent his childhood in such a destructive environment may well lack the self-control and judgment to avoid acting out violently. *See* Penry I, 492 U.S. at 323. As a result, in the eyes of jurors shackled to the future dangerousness question, "child abuse serves as an aggravating, rather than mitigating, factor." Robertson v. Cockrell, 325 F.3d 243, 278 (5th Cir. 2003) (*en banc*) (Dennis, J., dissenting) (footnote omitted). In his dissent, Judge Dennis observed that:

> ... Chief Justice Rehnquist noted in a different context in Santosky v. Kramer, 455 U.S. 745, 789 (1982) (Rehnquist, J., dissenting), "[i]t requires no citation of authority to assert that children who are abused in their youth generally face extraordinary problems developing into responsible, productive citizens." Given such common knowledge of the greater likelihood of recidivism among abused children, the Texas special issues leaves a jury with no room to register its conclusion that while a defendant is a future threat to society, his abuse as a child reduces his responsibility for that threat, making use of the death penalty inappropriate.

Id.

Prior to this Court's decisions in Tennard and Smith, the Fifth Circuit generally denied Penry claims premised on evidence of a troubled childhood background by applying its "constitutional relevance" screening test, which such evidence invariably failed – either because it was regarded as insufficiently "severe," or because it had no explicit causal "nexus" with the crime. On those

occasions when the Fifth Circuit addressed the capacity of the pre-1991 special issues to afford such evidence meaningful consideration as mitigating, it simply asserted, without explanation, that evidence of such trauma could be considered *as mitigating* under the "future dangerousness" question. *See, e.g.*, Robertson, 325 F.3d at 253 (finding that "the statutory special issues were adequate to allow the jury to effectuate the mitigating potential of" the defendant's evidence that he was beaten by his father); *see also* id. at 249-250 n.7 (citing numerous cases where "childhood abuse was proffered as mitigating evidence" and the Fifth Circuit denied Penry relief).

Even after Penry I, in which this Court found that evidence of childhood abuse could not be given mitigating consideration within the scope of the pre-1991 special issues, the Fifth Circuit's argument that evidence of childhood trauma could support a "no" answer to the future dangerousness question was logically indefensible. But after Smith, in which this Court found the pre-1991 special issues constitutionally deficient as applied *specifically* to evidence of a deprived childhood background, and explicitly held that the mitigating qualities of such evidence were *not relevant* to either the "deliberateness" or "future dangerousness" issues, it is remarkable that the Fifth Circuit continues steadfastly to maintain, in effect, that this Court must have been mistaken.

First, of course, the Fifth Circuit found in Petitioner's own case that because his background of abandonment, neglect, and deprivation "did not suggest that he was unable to learn from his mistakes," it was not likely to have been viewed by the jury "as an aggravating factor *only*," and thus that Penry was not implicated. Cole, 418 F.3d at 506-07 (emphasis added). It further noted that some of the testimony of Petitioner's experts "suggested ... that [Petitioner] could change in the future," evidence which it found "fits well within the broad scope of the future dangerousness special issue." Id. at 507. For those reasons, the court below concluded that Petitioner's evidence of

childhood trauma "falls within the scope of the special issues," holding that "the jury could have considered [Petitioner's] family background ... under – at the least – the future dangerousness special issue." Id.

Petitioner's case is no isolated anomaly. Since Tennard and Smith, the Fifth Circuit has repeatedly considered Penry claims involving comparable evidence of a traumatic or deprived background. Each time, it has concluded that, notwithstanding Smith, the jury could give such evidence full mitigating effect in deciding whether the defendant posed a "future danger" – and it has consistently cited the logic of its own pre-Smith opinions in support of that holding. *See, e.g.*, Newton v. Dretke, 371 F.3d 250, 256-57 (5th Cir. 2004) (evidence of defendant's difficult background was within the scope of the pre-1991 special issues) (citing James v. Collins, 987 F.2d 1116, 1121-22 (5th Cir. 1993) (evidence of, *inter alia*, "impoverished and abusive family history" could be adequately considered by jury under special issues)); Brewer v. Dretke, 442 F.3d 273, 280 (5th Cir. 2006) ("[E]vidence of a troubled childhood may, as a result of its temporary character, fall sufficiently within the ambit of the [future] dangerousness instruction"); id. at 280-81 (finding Jacobs v. Scott, 31 F.3d 1319, 1327 (5th Cir. 1994) to be "sufficient authority for our determination that the special issues [are] capable of giving Brewer's evidence of a troubled childhood constitutionally mitigating effect"); *see also* id. at 279 n. 16 (same)); Coble v. Dretke, 444 F.3d 345, 362-63 (5th Cir. 2006) (citing Jacobs to "reject [the] contention that the Texas special issues did not provide an adequate vehicle for the jury to make a reasoned moral response to Coble's mitigating evidence of his troubled childhood"). Indeed, the Fifth Circuit now regards this conclusion as so self-evident that it no longer requires *any* citation to authority. *See, e.g.*, Draughon v. Dretke, 427 F.3d 286, 297-98 (5th Cir. 2005) (in response to defendant's "claim that the jury could not give effect to his evidence of

abuse as a child and 'dysfunctional upbringing' in violation of Penry," stating only that "under controlling precedent [the claim] is lacking in merit. The jury could have given [the evidence] effect under the future dangerousness special issue.").

Leaving aside the fact that this reasoning is irreconcilable with the facts and the outcome of Smith, the Fifth Circuit's analysis fails to enforce a "fair reading" of Penry I as required by Johnson itself, the case upon which the court below purports to base its narrow interpretation of Penry I. Johnson emphasizes that the jury must have a "meaningful basis to consider the relevant mitigating qualities" of the defendant's evidence. 509 U.S. at 369. Because the "signature qualities of youth are transient," the future dangerousness question presented a "meaningful basis" for the jury to consider the fact of Johnson's youth. 509 U.S. at 368-69. Johnson does not imply, much less hold, that evidence of childhood deprivation like Petitioner's would fall outside Penry I's ambit. Instead, the evident implication of Johnson is that in Penry I the "relevant mitigating qualities" of Penry's evidence of childhood trauma (and thus of Petitioner's deprived background) found no reliable expression in the jury's answers to the special issues.

In short, the relevant mitigating quality of Petitioner's childhood abandonment and mistreatment is *not* that there exists some remote possibility that the destructive psychological and emotional consequences of those life experiences may eventually abate. Instead, the relevant mitigating dimension of Petitioner's traumatic background is that, by virtue of its influence on his behavior and judgment at the time of the crime, it significantly diminishes his moral culpability. That jurors must be afforded an adequate vehicle for responding to *this* aspect of a defendant's mitigating evidence is precisely what it means to insist on instructions that permit the jury to give "*full* consideration and *full* effect" to such evidence "in choosing [the] appropriate sentence." Smith,

543 U.S. at 38. The Fifth Circuit's treatment of Penry claims based on childhood deprivation and trauma is hopelessly in conflict with Smith.

The tension between the Fifth Circuit's begrudging view of the mitigating significance of childhood mistreatment and this Court's contrary view is further exacerbated by Williams v. Taylor, 529 U.S. 362 (2000). In addressing whether Williams suffered prejudice from his counsel's failure to develop evidence of his abused background, this Court conceded that such evidence "may not have overcome a finding of future dangerousness." 529 U.S. at 398. But the Court nonetheless found prejudice because a "description of Williams' childhood, filled with abuse and privation" could "well have influenced the jury's appraisal of his moral culpability." This conclusion necessarily entails the conclusion that evidence of childhood deprivation possesses mitigating significance *independent of its relationship to the defendant's likely future dangerousness.* Hence, jurors limited exclusively to assessing dangerousness cannot give "*full* consideration and *full* effect" to such evidence.

One final puzzling aspect of the Fifth Circuit's attempt to distinguish Smith is its confusion regarding the relationship between Penry I and Penry II. Although the court below initially conceded that Smith necessarily stands for the proposition that "the [former] special issues were not broad enough to encompass Smith's [mitigating] evidence," 418 F.3d at 504, everywhere else the Cole opinion treats Smith as having turned on the presence in that case of a "nullification instruction," which Petitioner's jury did not receive. Indeed, before even turning to what relationship Petitioner's mitigating evidence might have borne to the former special issues, the court below first detailed the history of "nullification instructions" in pre-1991 Texas cases. *See* Cole, 418 F.3d at 503-05. The panel then clearly indicated that it felt this history had some relevance to *Petitioner*'s Penry I claim,

saying, "With this [lengthy discussion of nullification instructions] in mind, we address Cole's claim...." Id. at 505. The opinion later returns to the question of "nullification instructions" to suggest that the outcome in Smith turned on the fact that his "jurors were faced with having to voice a false answer to a special issue ... to avoid the death penalty," while the trial court in Petitioner's case "did not deliver conflicting instructions [placing] the jurors in [such] an ethical dilemma." Id. at 508, 510.

This analysis is flawed for two reasons. First, Smith on its own terms provided a Penry I holding – that additional instructions were necessary because Smith's mitigating evidence "had little, if anything, to do with" the special issues. Smith, 543 U.S. at 48. Second, even under the Fifth Circuit's own precedent, it is settled that the presence of a "nullification instruction" does not require relief unless the defendant's mitigating evidence had relevance outside the pre-1991 special issues. *See, e.g.*, Coble, *supra*. Because this Court in Smith clearly engaged in a Penry I analysis and found the former special issues wanting as applied to Smith's evidence, the Fifth Circuit is obliged to treat Smith as a controlling precedent on Penry I, and give it a fair reading. This Court should grant *certiorari* to so hold.

B. THE FIFTH CIRCUIT'S POST-SMITH PRACTICE OF REFLEXIVELY CHARACTERIZING MENTAL DISORDERS LIKE PETITIONER'S AS "NON-PERMANENT" – AND THUS ALLEGEDLY MITIGATING UNDER THE "FUTURE DANGEROUSNESS" INQUIRY – SIMPLY RESURRECTS AS A *PER SE* BAR TO PENRY RELIEF THE "SEVERITY" SCREENING TEST THIS COURT EXPLICITLY REJECTED IN TENNARD.

Petitioner, like Penry, presented expert testimony that he suffers from a mental disorder that impairs his impulse control. In Petitioner's case, that disorder is neurological dysfunction, demonstrated by his extremely poor performance on a battery of tests tailored to detect such

impairment. RR XVII at 802-05. As the defense expert informed the jury, Petitioner's test results indicate "very likely central nervous [system] damage," which combined with "all the other factors of [his] background," produces "an individual with some real problems with impulse control." Id. at 808. Dr. Wright was forced to concede that because of the combination of Petitioner's background and his neurological impairment, Petitioner would likely pose a threat of future violence until "years from now." Id. at 813.

The Fifth Circuit found that Petitioner's evidence of mental disorder was within the jury's "effective reach" under the "future dangerousness" question, reasoning as follows. First, it emphasized that Petitioner's own experts had testified that – "not now, but later in life" – "individuals who have had this kind of background ... change. They burn out." Cole, 418 F.3d at 505-06. Second, it found that a juror who credited this part of the experts' testimony would have been able to honestly answer "no" to the future dangerousness question. Id. at 507-08 ("Specifically, the jury could have considered Cole's ... organic deficiency evidence under – at the least – the future dangerousness special issue. Given the experts' testimony during the punishment phase, the jury could have believed them and found that, although Cole ... may suffer from diminished impulse control, he is capable of change and thus would not necessarily remain a danger in the future").

The Fifth Circuit has offered the same rationale – identifying a defendant's mental disorder as "non-permanent," and then asserting that *any* non-permanent condition can by definition be given mitigating effect under the "future dangerousness" question – repeatedly in the wake of Smith. For example, the defendant in Coble, *supra*, presented expert testimony that he suffered from "two psychiatric disorders: post-traumatic stress disorder, brought about by his Vietnam experiences, and a bipolar disorder." Coble, 444 F.3d at 359. Like Petitioner's own experts, Coble's experts

conceded that his mental disorders "would make him a continuing threat." Id. However, some testimony also indicated that Coble "would be less likely to be violent if he took medication." Id. at 360. Citing its own pre-Smith cases, the Fifth Circuit concluded based on that testimony that "Coble's mitigating evidence demonstrated that his mental illness was treatable, thus placing it within the effective reach of the sentencer" under the "future dangerousness" question, as "[t]his Circuit has previously held." Id. at 361 (citing Lucas v. Johnson, 132F.3d 1069, 1082-83 (5th Cir. 1998); and Robison v.Johnson, 151 F.3d 256, 266 (5th Cir. 1998)).

The Fifth Circuit applied the same *per se* rule, prohibiting Penry relief to any claimant suffering from an arguably "non-permanent" mental disorder, in Brewer, *supra*. Brewer had suffered "a bout with depression three months before the murder [for which he] was briefly hospitalized," and had been "dominated and manipulated" by a woman with whom he was "obsessed." Brewer, 442 F.3d at 279. The Fifth Circuit began its analysis with the announcement that Smith's demand that instructions permit jurors to give "*full* consideration and *full* effect" to mitigating evidence was simply a matter of "semantics," because "[e]ven if the requirement is called 'full,' it means nothing more than 'sufficient.'" Id. at 278-79. Then, it trivialized the significance of Brewer's evidence of mental disorder, which it criticized as "not based on an especially strong factual predicate," since Brewer was "not adjudged mentally retarded" and had suffered only a "single episode" of clinical depression "without psychotic features." Id. at 275 n.1; *see also* id. at 279 (Brewer's evidence reflected only "a single episode of non-psychotic major depression"). It then applied its *per se* rule in the following terms: "This circuit has made a distinction between mental retardation and mental illness. [M]ental illness ... does not require any adjustment to the standard two-pronged interrogatory, and we have rejected habeas petitions on these grounds on other occasions. The only

instances in which mental illness has given rise to Penry I violations involve those where the illness in question is chronic and/or immutable." Id. at 280 (footnotes omitted). Since Brewer's mental disorder was non-permanent, Penry relief was *ipso facto* unavailable. Id. As in Coble, the Fifth Circuit supported this conclusion with citations to its pre-Smith opinions in Lucas and Robison. Id. at n.17 & n.18.

These cases well illustrate the Fifth Circuit's continuing practice, even post-Smith, of treating any "non-permanent" mental disorder as *per se* unproblematic under Penry I. That inflexible rule effectively resurrects the threshold screening test this Court rejected out of hand in Tennard. Where, prior to Tennard, the Fifth Circuit reflexively dismissed any non-permanent condition by holding, "Any non-permanent condition is by definition not 'constitutionally relevant mitigating evidence,'" it now reflexively dismisses the same evidence by holding, "Any non-permanent condition can support a 'no' answer to the 'future dangerousness question, so no additional instructions are necessary." This *per se* rule is nothing more than the now-discredited "uniquely severe permanent handicap" standard by another name. Tennard makes clear that a court reviewing for Penry I error should not assess the "permanence" or "severity" of the condition the defendant asserts as mitigating, but instead ask whether the jury could have expressed its reasoned moral response to the relevant mitigating qualities of that evidence in answering the special issues. Tennard, 542 U.S. at 287-89.[9]

The Fifth Circuit's analysis fails profoundly to appreciate what is actually *mitigating* about a

[9] None of the evidence at trial indicated that Petitioner's *neurological dysfunction*, as opposed to the *destructive impact of the mistreatment he suffered as a child*, was "non-permanent." The testimony the Fifth Circuit asserted would support such a characterization referred specifically to "individuals who have had this kind of *background*," and said nothing whatsoever about Petitioner's *central nervous system damage*. Contrary to the Fifth Circuit's claim, that condition, like the disabilities addressed in Penry, Tennard, and Smith, is permanent.

defendant's underlying mental disorder – *i.e.*, its effect on the defendant's moral culpability for the crime. *That* aspect of the underlying mental disorder is not captured in any way by the fact that there may exist some remote possibility that the disorder, as the years pass, may become less severe, or interfere less with the defendant's functioning in the world. Nor is it captured by testimony like that of Petitioner's experts, who offered only the unremarkable observation that individuals generally become less likely to be violent as they age, and that one might hope Petitioner would follow the same arc. *See, e.g.*, RR XVII at 813 (Dr. Wright's testimony that "research indicates that ... individuals who commit violent [acts]" change as they grow older, in part because "the process of aging takes over, *as it does in all of us*") (emphasis added). The court below treated this testimony as placing the evidence about Petitioner's impaired impulse control and his organic neurological deficits within the jurors' reach under the future dangerousness question.

But the mitigating inference that arises from such testimony is true for *any* offender; it is a *generic* argument that speaks to the likelihood that most offenders become less dangerous as they grow older. It is no less true of defendants who come from loving and supportive backgrounds and who lack any psychological, emotional, or neurological impairment than it is of a defendant like Petitioner, shaped by a background of neglect and mistreatment and burdened by neurologically impaired impulse control. In short, while the "future dangerousness" question may have been an adequate vehicle for the jury to give mitigating effect to generic evidence indicating that *all* defendants generally grow less violent as they age, it gave the jury *no* vehicle for expressing the conclusion that the unique constellation of mitigating circumstances present in Petitioner's background reduced his moral culpability for the crime so as to call for a life sentence.

Simply put, some of the trial testimony indicated Petitioner might grow less dangerous with

the passage of the years *for reasons unrelated to his mitigating circumstances* – for reasons that would apply, in Dr. Wright's words, to "all of us." The Fifth Circuit's view that this testimony somehow presented the jury with an adequate vehicle for giving full effect to the relevant mitigating qualities of the circumstances of Cole's background *as such* is erroneous, as is its broader view that allowing jurors to consider and give effect to the "non-permanent" nature of a mental disorder is an acceptable substitute for allowing them to consider and give effect to its actual consequences for an offender's moral culpability. While the transience or amenability to treatment of a particular mental disorder might make it *less aggravating* under the future dangerousness question, this Court's cases demand that the jury be provided a vehicle for considering such evidence *as mitigating* – not simply as "potentially somewhat less aggravating." This Court should grant *certiorari* to consider whether the Fifth Circuit's imposition of a strict "permanence" requirement for Penry relief can be sustained in light of Tennard and Smith.

C. THE FIFTH CIRCUIT'S PENRY ANALYSIS FAILED TO GIVE DUE REGARD TO THE FACT THAT HERE, AS IN MANY CASES TRIED UNDER THE PRE-1991 SENTENCING STATUTE, PROSECUTORS REPEATEDLY SOUGHT TO EXPLOIT THE NARROW SCOPE OF THE FORMER SPECIAL ISSUES AND REMIND JURORS THAT THEY WERE DUTY-BOUND TO ANSWER THOSE ISSUES ON THEIR OWN TERMS AND NOT TO ACHIEVE A JUST RESULT IN LIGHT OF PETITIONER'S MITIGATING EVIDENCE.

This Court has acknowledged that the context of the proceedings is relevant in determining whether a jury could reasonably have given effect to the defendant's mitigating evidence under its instructions. Boyde v. California, 494 U.S. 370, 383 (1990); Penry, 532 U.S. at 800-02, ("[W]e will approach jury instructions in the same way a jury would – with a commonsense understanding of the instructions in the light of all that has taken place at trial.") (internal quotations omitted). Another

vice of the Fifth Circuit's post-Smith treatment of Penry claims is that the court never examines either the arguments of counsel or the information provided to jurors during *voir dire* as a source for illuminating how the jurors may have understood the pre-1991 special issues to limit their sentencing discretion. The record of Petitioner's case is representative in this regard; both at *voir dire* and at closing argument, the prosecutors took advantage of the textual narrowness of the special issues and the jurors' oath to answer them according to the evidence – yet the Fifth Circuit failed to acknowledge, much less engage, those important facts in determining whether Penry was violated.

During *voir dire*, the prosecuting attorney repeatedly made statements blurring the distinction between "intentional," the *mens rea* for conviction of capital murder as charged in Petitioner's case, and "deliberate," the key term in the former first special issue. He acknowledged with most jurors that in common understanding there was little difference between "intentionally," as that term would be defined at the guilt phase, and "deliberately," which would not be defined. *See, e.g.*, RR VII at 909-910 (juror Thornesbery) (prosecutor concedes that "outside of the courtroom," intentional and deliberate "may mean the same thing," and that treating the terms as different is "a little bit like splitting hairs"); 911-12 (juror Thornesbery, asked to explain the difference between the two terms, confesses that he "do[es]n't know how"); RR IX at 1285 (juror Vogt) (prosecutor admits he "would be surprised if [the juror] said anything different than that they're pretty similar"); 1308-09 (it would be "virtually impossible" for juror not to answer the first special issue "yes" if the jury had already found the defendant guilty of capital murder); RR XI at 1481-82 (juror Golden) (prosecutor "would be surprised if [the juror] said [deliberately] meant that much different [from intentionally];" RR XII at 1743 (juror Engdahl) (it would be "hard" for juror not to "automatically and reflexively" find that the defendant acted deliberately if the jury had already convicted him of an intentional killing). In

light of those exchanges, it is impossible to conclud hat the jurors, once they had found that Petitioner "intentionally" killed Raymond Richardson, were able to give meaningful effect to Petitioner's mitigating evidence in determining whether he had also committed the murder "deliberately." *Cf.* Penry, 492 U.S. at 323 (absent definitions clearly distinguishing "deliberately" and "intentionally," court can have no confidence that jurors' "yes" answer to the first special issue represented a reasoned moral response that death was the appropriate sentence).

The court below also failed to acknowledge that the inadequacy of the pre-1991 special issues as applied to Petitioner's mitigating evidence was apparent from the closing arguments at punishment. From the Fifth Circuit's holding – that jurors doubtless understood that Petitioner's deprived background and mental disorder, in light of the testimony of his experts, supported a "no" answer to the "future dangerousness" question – one would expect to see *some* version of that argument offered by defense counsel. But Petitioner's trial counsel never argued that Petitioner's mitigating evidence logically supported a negative answer to the "future dangerousness" question. *See generally* RR XVII at 879-883. Instead, counsel effectively urged nullification, telling the jury that "[t]he right thing to do ... is to answer those special issues in such a manner that he be sent to prison for life." Id. at 881. It is unlikely, to say the least, that the jurors would have thought they could express a "reasoned moral response" to Petitioner's impairments by answering the "future dangerousness" question "no" where defense counsel never suggested any way they could do so without violating their oath to answer the questions honestly according to the evidence.[10]

[10] Indeed, in much the same vein, Penry's defense counsel initially urged the jury to answer the first special issue "no" because "it would be the just answer, and [a] proper answer." Penry I, 492 U.S. at 325. Ultimately, however, Penry's counsel, like Petitioner's, was reduced to arguing that it simply would be wrong to sentence someone to death who labored under such a disability.

Nor did the Fifth Circuit, in rejecting Petitioner's Penry claim, attend to the prosecutor's arguments. Here, just as in Penry I and Smith, the prosecutor responded to defense counsel's attempt to plead for nullification by demanding that jurors honor their oath to answer the special issues honestly according to the evidence. RR XVII at 886 (prosecutor argues that jury is not choosing to impose a death sentence, but is simply called on to "answer those [special issue] questions correctly"). He reminded jurors that they had "promised" during *voir dire* to answer the special issues "yes" if the State "met its burden of proof." Id. at 883. *Cf.* Penry I, 492 U.S. at 325 ("You've all taken an oath to follow the law and you know what the law is.... [Y]our job as jurors and your duty as jurors is not to act on your emotions, but to act [on] the evidence that you have heard in this courtroom, then answer those questions accordingly"); Smith, 543 U.S. at 48 n.5 (prosecutor argued that jurors "had promised to 'follow the law' and return a 'yes' answer to the special issues as long as the State met its burden of proof").

This Court emphatically has made clear that "nullification" is not an appropriate strategy for accommodating the Eighth Amendment requirement of individualized sentencing, even when the jury charge explicitly authorizes that response. Penry II, 532 U.S. at 790; Smith, 543 U.S. at 45-48. If anything, the unadorned pre-1991 special issues afforded Petitioner – whose counsel could only plead with jurors to "do the right thing" by answering the special issues "in such a manner that he be sent to prison for life" – even less protection than the defendants in those cases. Absent instructions to consider Petitioner's background as it bore on his moral culpability, the jurors were bound by their oaths – as the prosecutor urged – to return an affirmative answer to the second special issue.

The prosecutor's comments to several jurors during *voir dire* strengthen this inference about the preclusive effect of the special issues. For example, he elicited from juror Beeson her promise

not to "substitute [her] opinion" about the appropriate punishment for Petitioner "for what the legislature has provided," *i.e.*, the answers to the special issues, because the legislature has chosen to limit "the scope of [her] consideration" to those inquiries alone. RR XI at 1566-67; *see also* RR XI at 1577 (juror Beeson instructed by prosecutor that she may not "find against the evidence" in answering the special issues "just because of the way you felt about the parties or about the crime." The prosecutor made clear to juror Beeson that she must put her views about the appropriate punishment "out of [her] mind:"

> If a person had a bad upbringing, but looking at those special issues, you felt that they met the standards regarding deliberateness and being a continuing threat to society, could you still vote "yes," even though you felt like maybe they'd had a rough time as a kid? If you felt that the facts brought to you by the prosecution warranted a "yes" answer, could you *put that out of your mind and just go by the facts*?

RR XI at 1588 (emphasis added). Similarly, the prosecutor explained to juror Rocap that the jury "in Texas does not say life or death," but must "answer[] those questions ... to the best of their ability under their oath to judge the question and give the answer based on the evidence, regardless of what their personal preference might be as [to] what they'd like to see happen in the case." RR XIII at 1900. He elicited juror Rocap's promise "not [to] skew the answer [to the special issue questions] to produce the desired result contrary to the evidence." Id. at 1917.

In sum, the context of the proceedings as a whole, including *voir dire* and closing arguments as well as the evidence presented and the sentencing instructions and verdict form, argue for relief under Penry I. The prosecutor understandably sought to exploit the narrow inquiry of the special issues, and defense counsel begged for jury nullification in response. The Fifth Circuit, in improvising *post hoc*, counterintuitive ways in which the special issues might have been read more broadly by the jurors, ignored this vital contextual evidence in contravention of this Court's direction

in Boyde, Penry I and II, and Smith. The Court should grant *certiorari* to clarify that a proper Penry analysis must take account of not only what evidence was presented, but what jurors were told (and thus likely understood) about the meaning of the instructions and the scope of their sentencing discretion.

II. LEFT UNCHECKED, THE FIFTH CIRCUIT'S APPROACH WILL RESULT IN THE EXECUTION OF SCORES OF DEFENDANTS WHO WERE DENIED MEANINGFUL CONSIDERATION OF THEIR MITIGATING EVIDENCE.

It is understandable that this Court may ask how many times it must spend its resources reviewing death sentences imposed under a capital sentencing statute that was rightly jettisoned fifteen years ago. After all, as the Court observed in Penry II, Texas fixed the constitutional flaw in its statute in 1991. Penry II, 532 U.S. at 803. Today, jurors in every Texas capital case – like those in every capital case everywhere else in the U.S. – are provided an unambiguous and appropriately broad vehicle for giving *direct* mitigating effect to evidence about the defendant's character and background. No defendants in the future will suffer Petitioner's fate of being sentenced to death by jurors unable to give meaningful consideration to evidence of a deprived background, psychological problems, and neurologically impaired impulse control.

Nevertheless, the size and scope of the continuing "Penry problem" warrants this Court's intervention. At oral argument in Tennard in March 2004, the Court asked how many prisoners sentenced under the pre-1991 statute remain on Texas' death row. Counsel for Respondent answered, "By my last count there are approximately 100 ... on [d]eath [r]ow in Texas who were sentenced under this [pre-1991] sentencing scheme ...." Transcript of Oral Argument, Tennard v. Dretke, 2004 WL 720119 at *43. Petitioner's counsel estimated the number at "closer to 50." Id. at

•51. Information available online from the Texas Department of Criminal Justice indicates that 65 to 70 prisoners on Texas' current death row were sentenced under the pre-1991 statute (*i.e.*, were sentenced for offenses committed prior to September 1, 1991). Regardless of which of these numbers is correct, any of them would represent a substantial proportion of Texas' death row, one of the largest in the Nation. Indeed, the group of Texas prisoners who stand to be affected by a decision resolving the scope of Penry is larger than the entire death rows of many States, making the issue presented by Petitioner's case not just important, but certain to recur before this Court.[11]

Finally, it should make no difference that the *en banc* Fifth Circuit is presently weighing the scope of Penry in Nelson v. Dretke, No. 02-11096. After this Court granted *certiorari* and remanded for further consideration in light of Tennard, *see* Nelson v. Dretke, 542 U.S. 934 (2004), the Fifth Circuit initially denied relief in an opinion generally indistinguishable from its other post-Smith decisions, finding that Nelson's evidence of severe borderline personality disorder and childhood deprivation and mistreatment could be given mitigating effect under the "deliberateness" and "future dangerousness" questions. *See* Nelson v. Dretke, 442 F.3d 282 (5th Cir. 2006). Two weeks later, however, rehearing *en banc* was granted *sua sponte*. Nelson v. Dretke, 442 F.3d 912 (5th Cir. 2006).

---

[11] Counsel is aware of at least seven other Penry cases presently pending in the Fifth Circuit alone, in addition to three in (or coming to) this Court. Those pending in the Fifth Circuit include Coble v. Dretke, No. 01-50010 (pending on petition for rehearing; *see* Coble v. Dretke, 444 F.3d 345 (5th Cir. 2006) (denying Penry claim premised on evidence of child abuse, mental disorder, and good character); Mines v. Dretke, No. 03-11137 (*see* Mines v. Dretke, 118 Fed.Appx. 806 (5th Cir. 2004) (unpublished) (granting COA on Penry claim based on evidence of episodic mental disorder)); Chambers v. Dretke, No. 03-11248 (see Chambers v. Dretke, 145 Fed.Appx. 468 (5th Cir. 2005) (unpublished) (granting COA on Penry claim based on evidence of deprived background and positive family relationships)); R.G. Smith v. Dretke, *supra*; Bower v. Dretke, No. 03-40980 (*see* Bower v. Dretke, 145 Fed.Appx. 879 (5th Cir. 2005) (denying COA on Penry claim premised on evidence of good character); Reed v. Dretke, No. 05-70046; and Garcia v. Dretke, No. 03-11097. The cases in this Court include Petitioner's case, Brewer v. Dretke, *supra*; and Summers v. Dretke, No. 05-11074,

Petitioner respectfully submits that this Court should not defer action in his case in the hope that the *en banc* decision in Nelson might disavow the suffocatingly constricted reading of Penry that currently prevails in the Fifth Circuit. The Nelson panel opinion did not even produce a dissent, and no other Fifth Circuit case has taken this Court's opinion in Smith at its word. This issue is ripe for this Court's review *now*, in Petitioner's case.

III. THE FIFTH CIRCUIT'S APPROACH IN THESE CASES, LIKE ITS ARTICULATION OF THE "SEVERITY" AND "NEXUS" TESTS, THREATENS TO UNDERMINE THE ROLE OF INDIVIDUALIZED SENTENCING IN ENSURING A LINK BETWEEN MORAL CULPABILITY AND CAPITAL SENTENCING VERDICTS.

The Fifth Circuit's refusal to give Penry a "fair reading" even after Smith and Tennard represents a continuing failure to appreciate the significance of the individualization requirement and the vital role it plays in the structure of this Court's post-Furman capital sentencing jurisprudence. As we show below, this tendency was apparent prior to Tennard in the Fifth Circuit's rigid enforcement of its screening test for "constitutionally relevant mitigating evidence." Smith, by modeling the correct Eighth Amendment approach, provided even greater guidance for the Fifth Circuit to alter its unfounded approach. But the recrudescence of the Fifth Circuit's "uniquely severe permanent handicap" test this year, in the form of categorical *per se* rules excluding entire classes of mitigating evidence from Penry's ambit because they are not as "severe" as the particular facts of Penry itself, once again demands this Court's intervention.

As is now familiar, this Court's post-Furman cases strive to minimize arbitrariness in capital sentencing by (1) narrowing the class of "death-eligible" offenses and ensuring that particular offenders are reliably determined to fall into that class, and (2) ensuring that the sentence imposed on

---

as well as Laroyce Smith's own case.

a particular offender represents a "reasoned moral response" to his unique background and character and the circumstances of the offense. *See, e.g.*, Tuilaepa v. California, 512 U.S. 967, 972 (1994) (describing "eligibility" and "selection" decisions). With respect to the latter process, this Court has stated that "[w]hat is important at the selection stage is an *individualized* determination [of the appropriate sentence] on the basis of the character of the individual and the circumstances of the crime." Id.(emphasis in original; citations omitted).

In light of this longstanding emphasis on capital sentencing as an "*individualized* determination" of the appropriate sentence, perhaps the most grave problem with the Fifth Circuit's initial response to Penry was its development of a rigid "screening test" to exclude most types of evidence *ex ante* from consideration as potentially Penry-problematic. The screening test defined as "constitutionally relevant mitigating evidence" only those conditions which amounted to a "uniquely severe permanent handicap," with which the defendant was burdened through no fault of his own and which bore a causal "nexus" to the crime. *See* Tennard, 542 U.S. at 283-84. As this Court recognized in Tennard, such a "restrictive gloss" had the effect of foreclosing relief under Penry before the reviewing court even undertook any analysis of the adequacy of the pre-1991 "special issues" to accommodate the defendant's particular mitigating evidence. Id. at 286. It thereby short-circuited the process of ensuring that the jury had made an appropriately individualized judgment about the defendant's sentence.

It is now clear that in response to Tennard (and in willful ignorance of Smith), the Fifth Circuit has simply transformed its former "screening test" into a set of *per se* rules for denying Penry claims "on the merits." In every case in which the court below has refused Penry relief in the face of

mitigating evidence of childhood deprivation or abuse and/or mental disorder, it has attempted to distinguish Penry with the observation that the defendant's mitigating evidence is not as "severe" as Penry's, often by focusing on the defendant's ability to "learn from his mistakes." *See, e.g.*, Cole, 418 F.3d at 506 ("Unlike the evidence in Penry, Cole's mitigating evidence did not suggest that he was unable to learn from his mistakes"); Coble, 444 F.3d at 362 ("Coble's evidence is distinguishable from that in Penry [, which] resulted in a mental impairment that caused Penry to be in some way unable to learn from his mistakes. It is this inability to learn from one's mistakes that suggests a 'yes' to the future dangerousness [issue] and prevents the jury from being able to properly consider the defendant's abusive childhood as mitigating evidence. Coble does not argue that his troubled childhood resulted in any mental impairment that prevented him from learning from his mistakes.") (citation omitted); Brewer, F.3d at 281 ("mental illness [is not] tantamount to mental retardation for the purposes of our [Penry] case law"), id. ("There does not appear to be one iota of evidence suggesting either that Brewer's [clinical depression] is permanent or that he experienced cognitive limitations of any sort as a result of it").

This approach fails to grasp the profound importance of ensuring that every defendant sentenced under the pre-1991 statute was, *in fact*, treated individually – as the Eighth Amendment requires. As Smith emphasizes, jury instructions that afford "*full* consideration and *full* effect" to proffered mitigating evidence are important not for their own sake, but because giving the jury a direct and unambiguous vehicle for responding to mitigating evidence is essential to the task of "choosing the defendant's appropriate sentence." 543 U.S. at 38. The Fifth Circuit's mechanistic approach, under which any evidence not identical to Penry's is treated automatically as falling outside the ambit of Penry and Smith, fails to accord due regard to genuine individualization as an

indispensable feature of a constitutionally adequate capital sentencing system. *See* Eddings v. Oklahoma, 455 U.S. 104, 119 (1982) (O'Connor, J., concurring) (Eighth Amendment "require[s] us to remove any legitimate basis for finding ambiguity concerning the factors actually considered" by the sentencing authority at trial). The resulting systemic failure to protect the right to individualized sentencing, and thereby ensure a strong link between moral culpability and resulting sentencing verdicts, is a serious matter that warrants plenary review by this Court. *Cf.* Ring v. Arizona, 536 U.S. 584, 618 (2002) (Breyer, J., concurring) (diversity of views in the U.S. about the propriety of capital punishment "argues strongly for procedures that will help assure that, in a particular case, the community indeed believes application of the death penalty is appropriate ....").

CONCLUSION AND PRAYER FOR RELIEF

Petitioner's sentencing hearing was marred by exactly the same constitutional flaw as those in Penry and Smith – jurors heard mitigating evidence that could well have persuaded them to spare Petitioner's life, but were limited to instructions that gave them no vehicle for expressing that conclusion. This Court can have no confidence that Petitioner's death sentence represents the jury's actual conclusion that a death sentence was the *appropriate* punishment for his role in the crime. *Cf.* Smith.

This Court has explained that "[m]itigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case." Williams, 529 U.S. at 398. Equally important, a defendant's "reduced capacity for considered choice" and his "emotional history" both "bear directly on the fundamental justice of imposing capital punishment." Skipper v. South Carolina, 476 U.S. 1, 13-14 (1986) (Powell, J., concurring in judgment). Faithful adherence to those insights suggests the importance of reviewing – and

reversing – the Fifth Circuit's decision in Petitioner's case.

For the reasons set forth above, Petitioner respectfully prays that this Court grant a writ of *certiorari* to give plenary review to the judgment below. In the alternative, if the Court elects to consider the proper scope of Penry I in another case, Petitioner prays that the Court hold his case pending that decision;[12] or summarily reverse the judgment below; or grant such other relief as justice requires.

Respectfully submitted,

* Robert C. Owen
Texas Bar No. 15371950
OWEN & ROUNTREE, L.L.P.
P.O. Box 40428
Austin, Texas 78704
512-804-2661 (voice)
512-804-2685 (fax)

Jordan M. Steiker
727 East Dean Keeton St.
Austin, Texas 78705-3299
512-232-1346 (voice)
512-232-2399

Raoul D. Schonemann
3774 Harrison Street
Oakland, California 94611
510-654-1192 (voice)
415-904-5635 (fax)

* Counsel of Record for Petitioner
Member, Supreme Court Bar

ATTORNEYS FOR PETITIONER

[12] We expect the coming weeks will see petitions to this Court from numerous death-sentenced Texas prisoners seeking review of Penry issues denied by the Fifth Circuit or the Texas Court of Criminal Appeals, including one (Coble) who faces an August 30 execution date.

File Date
7/17/2006

(8)

No. 05-11284

IN THE
SUPREME COURT OF THE UNITED STATES

JALIL ABDUL-KABIR, fka Ted Calvin Cole,
Petitioner,

v.

NATHANIEL QUARTERMAN, Director, Texas Department of Criminal Justice, Correctional Institutions Division,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

GREG ABBOTT
Attorney General of Texas

KENT C. SULLIVAN
First Assistant Attorney General

DON CLEMMER
Deputy Attorney General
For Criminal Justice

*Counsel of Record

GENA BUNN
Chief, Postconviction
Litigation Division

*CARLA ELDRED
Assistant Attorney General
Postconviction Litigation Division

P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 936-1400

ATTORNEYS FOR RESPONDENT

QUESTIONS PRESENTED

1. Were the special issue questions broad enough for the jury to adequately consider Cole's mitigating evidence about his mental impairment and childhood mistreatment and deprivation?

2. Has this Court overruled Fifth Circuit decisions that reject *Penry* error "whenever the former special issues might have afforded some indirect consideration of the defendant's mitigating evidence?"

3. Does the Fifth Circuit's requirement that mental disorders be "severe, permanent, or untreatable" to warrant relief under *Penry* contradict this Court's rebuke of the "constitutional relevance" threshold test for mitigating evidence?

4. Did the prosecution prevent Cole's jury from fully considering and giving effect to Cole's mitigating evidence by imploring jurors to "follow the law," to "do their duty," and to answer the special issues on their own terms, without regard to the sentencing result?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 2

I. Facts of the Crime 2

II. Punishment Evidence 3

III. Course of Proceedings and Disposition Below 7

ARGUMENT 11

I. The Questions Presented for Review Are Unworthy of this Court's Attention 11

II. Cole's Challenges to the Special Issues Are Without Merit. 12

III. There is no "Reasonable Likelihood" That Cole's Jury Applied its Instructions in a Way That Prevented it From Considering His Mitigating Evidence of "Destructive Family Background," Poor Impulse Control, and "Organic Neurological Deficits." 17

CONCLUSION 21

TABLE OF AUTHORITIES, Continued

Cases **Page**

Bell v. Cone, 543 U.S. 447 (2005) 11

Bigby v. Dretke, 402 F.3d 551 (5th Cir. 2005) 14

Boyde v. California, 494 U.S. 370 (1990) 18

Brown v. Payton, 544 U.S. 133 (2005) 12

Eddings v. Oklahoma, 455 U.S. 104 (1982) 15

Franklin v. Lynaugh, 487 U.S. 164 (1988) 13,18

Graham v. Collins, 506 U.S. 461 (1993) ..... *passim*

Gregg v. Georgia, 428 U.S. 253 (1976) 20

Johnson v. Texas, 509 U.S. 350 (1993) ..... *passim*

Jurek v. Texas, 428 U.S. 262 (1976) ..... *passim*

Lindh v. Murphy, 521 U.S. 320 (1997) 11

Lowenfield v. Phelps, 484 U.S. 231 (1988) 13

Penry v. Johnson, 532 U.S. 782 (2001) ("Penry II") ..... *passim*

Penry v. Lynaugh, 492 U.S. 302 (1989) (*"Penry I"*) ..... *passim*

Pulley v. Harris, 465 U.S. 37 (1984) 18

Richardson v. Marsh, 481 U.S. 200 (1987) 18

Saffle v. Parks, 494 U.S. 484 (1990) 18

Singleton v. Wulff, 428 U.S. 106 (1976) 17

TABLE OF AUTHORITIES, Continued

Cases **Page**

Smith v. Texas, 543 U.S. 37 (2004) ..... *passim*

Teague v. Lane, 489 U.S. 288 (1989) 10

Tennard v. Dretke, 542 U.S. 274 (2004) ..... *passim*

Tuilaepa v. California, 512 U.S. 967 (1994) 13

Woodford v. Visciotti, 537 U.S. 19 (2002) 11

Constitutions, Statutes and Rules

U. S. Const., amend. VI 8

U. S. Const., amend. VIII 13,15

U. S. Const., amend. XIV 8

28 U.S.C. § 2253©) (West 2006) 11

28 U.S.C. § 2254(West 2006) 13

Sup. Ct. R. 10 (West 2006) 11

Miscellaneous

Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") 11,21

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This is a federal habeas death penalty case. In 1987, Petitioner Jalil Abdul-Kabir, formerly known as Ted Cole, (hereinafter "Cole"), confessed to robbing sixty-six-year-old Raymond Richardson of twenty dollars and fatally strangling him because "it was quiter [sic] then [sic] shooting him and not as messy as cutting his throat, and it just seemed the easiest way to do it."[1] A jury found Cole guilty, reviewed his lengthy criminal history, and concluded that nothing in his history—not his neurological impairment, not his absentee parents, not his childhood hardships—was sufficiently mitigating to warrant a life sentence for the murder. Cole blames the Texas death-penalty statute and the prosecutors for that outcome. Specifically, he maintains that, had the Texas Legislature framed the special punishment issues differently, and had prosecutors not insisted that jurors "follow the law," his jury would have sentenced him to life. Cole also argues that the lower court incorrectly applied Supreme Court precedent in ruling that the special issue questions afforded the jury an adequate vehicle through which to consider his history and mitigating circumstances. But absent any substantial showing that the jury could not fully consider that evidence before rendering its punishment verdict, Cole's jabs at the special issue questions, the lower court's opinion, and the prosecution's closing statements offer not the slightest justification for this Court's intervention in this case. The petition should be denied.

---

[1] *Cole v. Dretke*, 418 F.3d 494, 497 (5th Cir. 2005), *pet. filed* (March 30, 2006) (No. 05-11284); Appendix C at 13; 28 SR 42 (SX S-35 - autopsy report). "SR" refers to the state court record of transcribed trial proceedings, or statement of facts, preceded by volume number and followed by page number. "SX" refers to a State Exhibit entered at Cole's trial, followed by exhibit number.

STATEMENT OF THE CASE

I. Facts of the Crime

The facts supporting Cole's capital murder conviction are summarized in the lower court's published opinion as follows:

> In December 1987, Cole was staying at an abandoned motel with his stepbrother, Michael Hickey ("Michael"), and Michael's wife, Kelly Hickey ("Kelly"). Cole mentioned to the Hickeys that he was willing to kill someone to obtain cash. Cole and Michael decided to rob Kelly's grandfather, Raymond Richardson, and then strangle him to death.
>
> Two days after this conversation, Cole, Michael, and Kelly went to Richardson's home and visited with him in his living room for several hours. The group moved to the kitchen. As Richardson left the kitchen, Cole pushed him to the floor, where Richardson landed face down. Cole then sat on Richardson's back and strangled him with a dog leash that the men had brought to the house for this purpose. After Richardson died, the group put his body under his bed. They searched the house for cash, finding twenty dollars in Richardson's wallet. Michael took the money from the wallet, and Cole took the money to the grocery store to buy beer and bacon. Cole returned to Richardson's house and shared the groceries with Michael. The morning after the murder, Kelly and Michael surrendered themselves to the police and gave statements. Kelly eventually testified at Cole's trial.
>
> The police arrested Cole at Richardson's home the morning after the murder. Cole gave the police two statements in which he confessed to having murdered Richardson. The statements were introduced against Cole at trial. In one of these statements, Cole admitted that the group decided to strangle Richardson because "it was quiter [sic] then [sic] shooting him and not as messy as cutting his throat, and it just seemed the easiest way to do it." [On June 4, 1988,] [t]he jury found Cole guilty of the capital murder of Richardson while in the course of committing and attempting to commit robbery.[2]

---

[2] *Cole*, 418 F.3d at 496-7; Tr 181. "Tr" refers to the transcript of trial papers that were filed with the convicting court during Cole's capital murder trial, followed by page numbers.

II. Punishment Evidence

At the punishment phase, Cole's jury addressed two issues: whether the killing was deliberate and whether "there was a probability that Cole posed a threat of future dangerousness."[3] In answering those questions, the jury was free to consider "all of the evidence submitted . . . in the full trial of this case"—guilt-innocence and punishment phases combined.[4] Given Cole's confession, and the nature of the crime, "deliberateness" appeared to be a given. And, as the Fifth Circuit noted, "[t]he State presented a strong case at the penalty phase"[5] that Cole would continue to be dangerous.

> . . . One of the State's main pieces of evidence was Cole's own diary, which was found in Richardson's home shortly after the murder. In this diary, Cole recorded his desire to "have" a 12-year-old boy named Cody, whom Cole described as "jail bait" . . . Cole also recorded his desire to find a companion "who is young, attractive and with a sense of adventure, with whom I can roam around the world, sailing in the South Pacific, the Caribbean, exploring the Mediterranean, partying somewhere in the South American jungles, smuggling, stealing, robbing, raping, pillaging, modern-day Vikings or pirates" . . . .
>
> The State introduced evidence to show that Cole was charged with the murder of Gary Don Dedecker approximately 15 years before the instant crime. This charge originally resulted in a mistrial. At one point before the trial, Cole told a bailiff that he had killed Dedecker and "would kill him again."

---

[3] *Cole*, 418 F.3d at 502-3 (citing TEX. CODE CRIM. PROC. Art. 37.071(2)(b)).

[4] *Id.* at 502.

[5] *Cole v. Dretke*, 99 Fed. Appx. 523, 527 (5th Cir. 2004) (unpublished); *cert. granted, Abdul-Kabir v. Dretke*, 543 U.S. 985 (2004), *on remand*, 418 F.3d 494, *rhg en banc denied by Cole v. Dretke*, 443 F.3d 441 (5th Cir. 2006), *pet. filed* (March 30, 2006) (No. 05-11284).

Cole, who was 16 or 17 years old at the time, eventually pleaded guilty to this charge. Cole described Dedecker as his "best friend," yet he gave a statement to police in which he asserted that he murdered Dedecker because he wanted Dedecker's car. He [explained] . . . that he had killed Dedecker because he wanted to know what it was like to kill a person.

The State introduced evidence of a family friend who had let Cole stay in her home when he was 23 years old and had nowhere else to go. Cole molested this woman's eight-year-old son and the son's 10-year-old friend, and he was subsequently convicted of sexual assault charges based on these acts. The son, who was 15 years old at the time of trial, testified in detail as to the sexual acts Cole had performed on him and his friend.[6]

Defense counsel countered that evidence with mitigating testimony that:

- Cole's mother was an alcoholic and was unable to care for her children;
- Cole's father was arrested for attempting to rob a liquor store;
- Cole's father abandoned the family when Cole was five years old;
- Cole's mother moved into her parents' home with her children;
- Cole's grandparents were alcoholics and did not welcome the children;
- Cole was isolated from his peers because his grandparents lived eight miles out of town;
- School buses did not run to the grandparents' home, and the grandparents did not allow Cole's mother to borrow a car to drive Cole to school;
- Cole was placed in a children's home at age five;
- Cole's mother visited him only twice during his five-year residence at the children's home, and his father never visited; and
- Cole's uncle adopted Cole's brother, but did not adopt Cole.[7]

---

[6] *Cole*, 99 Fed. Appx. at 528 (footnote omitted).

[7] *Cole*, 418 F.3d at 500.

The jury also heard testimony from Dr. Jarvis Wright, a mental health expert retained by defense counsel, that Cole's childhood was "very rugged," "tough," and "painful"; that Cole "never felt loved and worthwhile in his life," and that this background resulted in Cole's experiencing "chronic depression" and "terrific needs for nurturance."[8] Though Cole "started out in life with 'fantastic raw material,'" Wright explained, "the abandonment, neglect, and mistreatment that he suffered as a child left his personality 'very damaged' and 'horribly' distorted."[9]

Wright also testified that Cole has "diminished impulse control" because of his "organic neurological deficiency" that "very likely" indicated central nervous damage.[10] "Combine that and all the other factors of [Cole's] background, all these other things, we're going to have an individual with some real problems with impulse control."[11] Furthermore, according to Wright, "the combination of Cole's destructive childhood of neglect and abandonment had impaired his judgment and his ability to control his behavior . . . [and] Cole learned to cope with reality by living in a 'fantasy' world."[12]

But Cole's jury also learned that he was able to control his impulses. Indeed, as the lower court noted in its published opinion, Wright conceded that "even though Cole's diary demonstrated a 'fantasy' to behave like a 'modern-day Viking' or a 'pirate,' Cole was

---

8 *Id.*

9 *Id.* at 500-1.

10 *Cole*, 418 F.3d at 501.

11 *Id.*

12 *Id.*

unlikely to act on such fantasies because he did not have the 'wherewithal' to do so."[13]

Wright similarly opined that Cole would become less violent over time:

> I think the research certainly indicates that individuals like [Cole], individuals who have had this kind of background, tend to begin to make changes at about forty, forty-five, fifty, somewhere in there. They tend to mellow a lot and change a good bit. You can infer that from some of the FBI statistics on age and changes in persons.
>
> But I think as we see him age, get older, hormones change, the process of aging takes over, as it does in all of us - and we all change. I think the evidence is overwhelming there that individuals who have behaved as he has change. They burn out. And I think there's a good chance of later in life—not now, but later in life—some changes.
>
> I'm suggesting that, as we grow older, we change; the compass points a different direction. We're tired. . . . our orientation is different. The research indicates that . . . this is the case with individuals who commit violent or antisocial acts.
>
> We also know from probabilities that, as people grow older, the probability of them becoming involved in violent acts decreases to the point of fifty, where the FBI statistics would indicate that they're almost - it almost doesn't happen. These behaviors have almost burned out of individuals. While they may be flaming while they're younger, they burn out later. So I don't have any specific statements for [Cole] as an individual. That would take a crystal ball. But for [Cole] as a . . . human being, we know this happens to human beings who are like [Cole], who have histories like [his]. We know from statistics that they change, as we do all change.[14]

Defense witness Dr. Wendel Dickerson also testified that Cole's violent tendencies were likely to decrease: "[W]hatever condition [Cole] is suffering from is not necessarily immutable and unchangeable. . . . [I]t can be changed . . . experience changes people.

---

[13] *Id.* at 506.

[14] *Id.*

Changes in body changes people. . . . [J]ust because he's . . . considered dangerous today, does not necessarily mean he's going to be dangerous at some future point in time."[15] The jury answered "Yes" to both special issues.[16]

III. Course of Proceedings and Disposition Below

In accordance with the jury's guilt-innocence and punishment verdicts in June 1988, the trial court sentenced Cole to death for capital murder.[17] The Texas Court of Criminal Appeals affirmed the conviction and sentence in an unpublished opinion,[18] and this Court denied certiorari review.[19]

Cole then initiated state habeas proceedings in a twenty-one-claim petition alleging, among other things, that his jury was unable to consider his mitigating evidence under *Penry v. Lynaugh*, 492 U.S. 301 (1989) (*Penry I*).[20] The trial court recommended that relief be denied.[21] In particular, the court found that the punishment-phase evidence, "especially evidence from [Cole's] expert witnesses, provide a basis for the jury to sufficiently consider" Cole's mitigating evidence.[22] The Court of Criminal Appeals reviewed the record, adopted

---

15 *Id.* at 506.

16 Tr 181.

17 Tr 170, 177, 180-82; 16 SR 569-71; 17 SR 896-902.

18 *Cole v. State*, No. 70,401 (Tex. Crim. App. Sept. 26, 1990).

19 *Cole v. Texas*, 499 U.S. 982 (1991).

20 SHTr 4, 25-138. "SHTr" refers to the state habeas transcript—the transcript of pleadings and documents filed during state habeas corpus proceedings—followed by page number.

21 SHTr 1-19.

22 *Id.* at 9.

the trial court's findings and conclusions (with two exceptions), and denied the petition in November 1999.[23]

On June 1, 2000, Cole filed submitted to the San Angelo Division of the United States District Court for the Northern District of Texas a federal writ petition that raised the following questions:

(1) Was Cole's jury able to consider and give effect to his mitigating evidence?
(2) Did the testimony from a court-appointed defense psychiatrist violate Cole's Sixth and Fourteenth Amendment rights?
(3) Was appellate counsel ineffective?
(4) Did the trial court deprive Cole of a fair trial by excluding testimony about his reasons for pleading guilty to a prior murder conviction?
(5) Was trial counsel ineffective for not investigating mitigating evidence?[24]

As to Claim 1, the district court first addressed whether the evidence of "destructive family background" and "organic neurological deficits" was "constitutionally relevant mitigating evidence" under Fifth Circuit precedent.[25] The district court ultimately found that both categories of evidence fell short of that standard.[26]

---

[23] *Ex parte Cole*, Application No. 41,673-01 (Tex. Crim. App. Nov. 24, 1999); SHTr at Cover & at unpublished order.

[24] *Cole v. Johnson*, No. 6:00-CV-014-C (N.D. Tex.); Appendix C at 1, 5, 18, 25, 27, 30.

[25] *See* Appendix 2 at 9-13.

[26] *Id.* at 13-15 ("[N]o nexus was established between events in Cole's childhood and his later commission of the capital murder offense . . . [and] [t]he evidence is entirely insufficient to prove that Cole did, in fact, suffer from an organic neurological deficit", "was totally incapable of controlling his impulses," or "was somehow unable to distinguish right from wrong.").

Second, the district court explained that, regardless of its constitutional relevancy, the evidence Cole presented during his trial's penalty phase was fully within his jury's effective reach given the broad scope of the special issue questions.[27]

> Evidence of Cole's destructive family background evidence could be considered under the future dangerous special issue.
>
> Evidence of Cole's organic neurological deficiency could be considered under either the deliberateness or the future dangerousness special issues. Testimony regarding Cole's lack of impulse control was offered to explain the offense and demonstrate a capacity for change through his "outgrowing" the impulsivity over time. The relevance of this evidence to the future dangerousness inquiry of the second issue is readily apparent.[28]

Consequently, the district court found objectively reasonable the state court's finding that Cole's evidence was not beyond the scope of the special issues.[29] The court also found Cole's *Penry I* claim to be *Teague*-barred, and denied relief on March 6, 2001.[30] Cole moved to alter or amend the judgment, which the court denied. He then applied for a certificate of appealability (COA), which the district court also denied.[31]

On review to the Fifth Circuit Court of Appeals, Cole obtained COA on Claims 2 and 5. The appellate court also issued COA on its own motion regarding a procedural default

---

[27] *Id.* at 15.

[28] *Id.* at 16 (citations omitted).

[29] *Id.*

[30] *Id.* at 17 ("To the extent Cole seeks a special jury instruction even though the evidence was within the effective reach of the jury, then he asks this Court to announce a new rule of constitutional law in violation of the non-retroactivity doctrine of *Teague v. Lane*, 489 U.S. 288, 310 (1989)."); Appendix C at 37.

[31] *Id.*

determination.[32] But no COA issued on the other claims, which included Claim 1—"a claim that the trial court's penalty-phase jury instructions were unconstitutional under [*Penry I*]."[33]

In denying COA on Cole's *Penry I* claim, the Fifth Circuit addressed only the *first* basis for the district court's denial—not the second.[34] In other words, the lower court did *not* initially address whether Cole's jury could have considered his mitigating evidence under the two special issues. Instead, the court applied its "nexus" test, concluded that Cole's evidence was not constitutionally relevant under that test, and declared that there was no need for it to address whether the jury could have fully considered such evidence within the scope of the special issues.[35] Once the evidence was deemed constitutionally irrelevant, the lower court considered the matter closed.[36] In May 2004, the lower court denied Cole's request for reconsideration and affirmed the district court's denial of relief.[37]

---

[32] *Cole*, 99 Fed. Appx at 525.

[33] *Id.*

[34] *See Cole v. Cockrell*, No. 01-10646, slip op. at 6 (5th Cir. Aug. 13, 2003) (unpublished opinion holding that "Cole has not shown that jurists of reason could debate the correctness of the district court's determination that the nexus requirement applies to his *Penry* [*I*] claim").

[35] *Id.*, slip op. at 5.

[36] *Id.*

[37] *Id.* at 525, 533.

This Court granted certiorari review, vacated the Fifth Circuit's judgment, and remanded "for further consideration in light of *Tennard v. Dretke*, 542 U.S. 274 [] (2004),"[38] which had rejected the lower court's "constitutional relevancy" test for mitigating evidence.[39]

On remand, the lower court reversed, issued COA on Claim 1, and affirmed the district court's decision denying habeas relief.[40] This proceeding follows.

ARGUMENT

I. The Questions Presented For Review Are Unworthy Of The Court's Attention.

As provided in the Supreme Court Rules, certiorari review is not a matter of right, but of judicial discretion, and will only be granted for "compelling reasons."[41] Cole offers no compelling reason in this case, so this Court should deny his petition.

Furthermore, this is a federal habeas proceeding from the Fifth Circuit Court of Appeals. Consequently, the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") controls the outcome of any requested review.[42] Under the Act's "highly deferential standard,"[43] no writ of habeas corpus is permitted on claims that were denied on their merits in state court unless the state-court adjudication—

---

[38] *Abdul-Kabir*, 543 U.S. 985.

[39] *Tennard*, 542 U.S. at 284 ("The Fifth Circuit's ["constitutional relevancy"] test has no foundation in the decisions of this Court.").

[40] *Cole*, 418 F.3d at 494, 496.

[41] SUP. CT. R. 10 (West 2006).

[42] 28 U.S.C. § 2253(c) (West 2006).

[43] *Bell v. Cone*, 543 U.S. 447, 455 (2005) (quoting *Lindh v. Murphy*, 521 U.S. 320, 333 n.7 (1997) and *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) *(per curiam)*).

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.[44]

The lower court properly found that "[t]hese conditions for the grant of federal habeas relief have not been established."[45] Accordingly, this Court should deny Cole's request for certiorari review.

II. Cole's Challenges to the Special Issues Are Without Merit.

Cole killed a man for twenty dollars—fatally strangled his victim with a dog leash, in fact—and after considering all of the evidence submitted at Cole's trial for that crime, a jury concluded that nothing in Cole's background was sufficiently mitigating to spare him from the death penalty. Specifically, Cole's jury found that he deliberately committed murder and that "there was a probability that [he] posed a threat of future dangerousness."[46] Given those findings, the trial judge was required by law to sentence Cole to death.[47]

---

[44] 28 U.S.C. § 2254 (West 2006).

[45] *Brown v. Payton*, 544 U.S. 133, 136 (2005) (finding that the Ninth Circuit's grant of relief on a claim that petitioner's murder trial jury instructions did not permit full consideration of mitigating evidence was "contrary to the limits on federal habeas review imposed by 28 U.S.C. §2254(d)"); *Cole*, 418 F.3d at 505 ("[U]nder the instructions it was given, the jury could have considered and given effect to Cole's mitigating evidence under the future dangerousness special issue.").

[46] Tr 181.

[47] Tr 182.

Cole blames the Texas death-penalty scheme for that outcome. According to him, the two special issues inquiring as to Cole's "deliberateness" and "future danger" were not broad enough for the jury to fully consider his "extensive evidence that he was neglected, abandoned, and mistreated as a child, including evidence that one parent was an alcoholic and the other a criminal."[48] But the State tried and sentenced Cole under statutes and special issues that this Court has repeatedly upheld.[49] Moreover, Eighth Amendment claims turn on their facts, and in denying relief, the lower court keenly observed that this Court draws a "significant distinction between the type of evidence that Penry presented at his trial and the evidence that Cole presented at his[.]"[50] In a variety of cases involving evidence similar to Cole's, this Court upheld the same instructions and special issues Cole challenges here.[51] In

---

[48] Petition at 17.

[49] *See Jurek v. Texas*, 428 U.S. 262, 272-73 (1976) (holding that Texas' punishment-phase special issue questions sufficiently allow Texas juries to consider a capital murder defendant's mitigating circumstances such as his criminal record (or lack thereof), the range of severity of that record, his youth, the circumstances of his crime, duress and mental or emotional disturbance, and remorse before sentencing him to death); *Lowenfield v. Phelps*, 484 U.S. 231, 245 (1988) (reaffirming *Jurek*'s holding on this issue), *Franklin v. Lynaugh*, 487 U.S. 164, 182 (1988) (same). *See also Tuilaepa v. California*, 512 U.S. 967, 976-77 (1994) ("[T]he States have considerable latitude in determining how to guide the sentencer's decision in this respect.").

[50] *Cole*, 418 F.3d at 507.

[51] *Johnson*, 509 U.S. at 368 ("We believe that there is ample room in the assessment of future dangerousness for a juror to take account of the difficulties of youth as a mitigating force in the sentencing determination."); *Graham v. Collins*, 506 U.S. 461, 463 (1993) (addressing mitigating evidence of youth, troubled childhood, and good character); *Franklin*, 487 U.S. at 168 (addressing prior good behavior while incarcerated); *Jurek*, 428 U.S. at 266-67 (deeming evidence of youth, intoxication, and good character to be mitigating). *See also Cole*, 418 F.3d at 509 (noting that this Court upheld in *Johnson* an instruction nearly identical to that submitted to Cole's jury).

light of that precedent, and the particular evidence Cole presented at trial, Cole cannot convincingly argue that his jury had no adequate "vehicle" through which to consider his circumstances and background before rendering its punishment verdict.[52] Accordingly, the Fifth Circuit correctly found his *Penry I Tennard I Smith*[53] challenges to the special issues to be without merit.

Nothing in the Fifth Circuit's opinion warrants review by this Court. First, on remand, the lower court abandoned its problematic "constitutional relevancy" test and found that, under "the low threshold for relevant mitigating evidence articulated by the *Tennard* Court," the evidence Cole presented regarding his "turbulent family background" and his lack of impulse control due to an "organic neurological deficiency" is relevant mitigating evidence."[54] Second, the lower court issued COA on Cole's *Penry I* claim (alleging that the special issues are not broad enough to have allowed Cole's jury to give full consideration and effect to his mitigating evidence) because "[i]n light of [this Court's] decision in *Smith* and the [circuit] opinion in *Bigby*[55] . . . jurists of reason could debate the district court's conclusion that Cole's mitigating evidence was not beyond the effective reach of the jury."[56]

---

[52] *Penry v. Johnson*, 532 U.S. 782, 797 (2001) (*Penry II*) (citing *Penry I*, 492 U.S. at 319, 328). *See also Eddings v. Oklahoma*, 455 U.S. 104, 113-14 (1982) ("Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence.").

[53] *Smith v. Texas*, 543 U.S. 37 (2004); *Tennard v. Dretke*, 542 U.S. 274 (2004); *Penry II*, 532 U.S. 782; *Penry I*, 492 U.S. 302.

[54] *Cole*, 418 F.3d at 500-1.

[55] *Bigby v. Dretke*, 402 F.3d 551, 564-65 (5th Cir. 2005) (revising the Fifth Circuit's *Penry I* test in light of *Tennard*).

[56] *Cole*, 418 F.3d. at 502.

Third, addressing the merits of the claim, the lower court concluded that the special issues submitted to the jury sufficiently allowed for such consideration.[57]

In so ruling, the lower court distinguished *Penry I*, *Penry II*, *Smith* and *Tennard*, noted that these types of Eighth-Amendment cases turn on their facts, and explained that Cole's case presented no facts or evidence that were beyond the scope of the special issues in *his* case because, unlike the punishment evidence the petitioners in *Penry* and *Smith* presented at their trials, none of Cole's evidence was *aggravating*:

> Cole's reliance on *Penry I*, *Penry II*, *Tennard*, and *Smith* is misplaced. *Penry I* and *II* are readily distinguishable from this case. In *Johnson v. Texas*, the Supreme Court confirmed the limited scope of *Penry I* and *II*. Although the defendant in *Johnson* insisted that the Texas special issues prevented the jury from considering the mitigating effect of his youth, the Court rejected that argument and, in doing so, clarified *Penry*'s scope.
>
> In *Johnson*, the Court explained that in *Penry*, "there was expert medical testimony that the defendant was mentally retarded and that his condition prevented him from learning from his mistakes." As the expert testimony intimated that Penry was unable to learn from his mistakes, the *Johnson* Court concluded that the only logical manner in which Penry's jury could have considered the evidence of his mental retardation under the future dangerousness special issue was as an *aggravating* factor: Penry would remain a danger in the future because there was no chance that he would ever understand that rape and murder were wrong. Thus, Penry's jury was unable to give any mitigating effect to the mental retardation evidence that he proffered.
>
> Here, however, the mitigating evidence of Cole's destructive family background and organic neurological deficiency falls outside of *Penry*'s holding. With regard to Cole's mitigating evidence of "organic deficiency," the testimony proffered by two of Cole's own expert witnesses is directly contrary to the testimony at Penry's penalty phase that the *Penry* Court found aggravating.
>
> . . . .

---

[57] *Cole*, 418. F.3d at 505.

Neither *Tennard* nor *Smith* changes *Johnson*'s analysis of *Penry* . . .[58]

Crucial to the lower court's analysis is the fact that both Wright and Dickerson testified that Cole is likely to change over time.[59] "Unlike the evidence in *Penry*, Cole's mitigating evidence did not suggest that he was unable to learn from his mistakes [and] [t]he record does not suggest that the jury viewed Cole's mitigating evidence as an aggravating factor only, *i.e.*, because he cannot learn from his mistakes, he will remain a danger in the future."[60]

Nor *could* the jury have given Cole's evidence such aggravating effect.

> The state prosecutor did not ask the jury to consider Cole's mitigating evidence as aggravating. Neither did he "press[ ] exactly the most problematic interpretation of the special issues, suggesting that [Cole]'s low IQ was irrelevant in mitigation, but relevant to the question whether he posed a future danger." Accordingly, Cole's prosecutor . . . did not place the jurors in the ethical dilemma of responding falsely to a special issue.[61]

Given Wright and Dickerson's punishment-phase testimony, "the jury could have believed them and found that, although Cole suffered a turbulent childhood and may suffer from diminished impulse control, he is capable of change and thus would not necessarily remain a danger in the future."[62] "[T]he jury could [also] have considered Cole's family background and organic deficiency evidence under—at the least—the future dangerousness special issue."[63] All of that evidence fits within the scope of the special issues, and the Fifth

---

58 *Id.* at 505, 508 (citations omitted).

59 *Cole*, 418 F.3d at 506, 507.

60 *Id.* at 506-7.

61 *Id.* at 508.

62 *Id.* at 507-8.

63 *Id.* at 507.

Circuit was right to affirm the district court's alternative ground for denying relief on this claim.[64]

Any holding to the contrary would amount to "a wholesale abandonment of *Jurek*,"[65] which neither *Smith* nor *Tennard* suggest or purport to do. In neither case did this Court alter the rule of *Penry I* or undermine any of the valid Fifth Circuit cases that apply *Penry I* where constitutional relevance was *not* the *sole* basis for denying relief.[66]

III. There is no "Reasonable Likelihood" That Cole's Jury Applied its Instructions in a Way That Prevented it From Considering His Mitigating Evidence of "Destructive Family Background," Poor Impulse Control, and "Organic Neurological Deficits."

Relying heavily on *Smith and Penry II*, Cole next claims that the jury's punishment deliberations were tainted by improper voir dire and closing arguments that prevented the jury from giving meaningful effect to Cole's mitigating evidence within the scope of the special issues.[67] This argument is likely procedurally barred because Cole did not make this point in state court.[68] Regardless, "the claimed error amounts to no more than speculation"

---

[64] *Id.* at 507.

[65] *Graham*, 506 U.S. at 476.

[66] *See Smith*, 543 U.S. at 43 (explaining that the Supreme Court's rejection of the Fifth Circuit's threshold standard for 'constitutionally relevant mitigating evidence' was "central to [the] decision to reverse in *Tennard*").

[67] *See* Petition at 28-29, 30-31.

[68] *Singleton v. Wulff*, 428 U.S. 106, 120 (1976) ("It is the general rule . . . that a federal appellate court does not consider an issue not passed upon below.").

given the lack of any reasonable likelihood that Cole's jurors applied their instructions in a way that prevented them from considering his mitigating evidence.[69]

Moreover, as this Court has held, jurors are presumed to apply their common sense in rendering their verdicts.[70]

> [They] do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting.[71]

And Cole has offered no evidence rebutting the presumption that his jurors adhered to both their common sense and the trial court's instructions in rendering their punishment verdict.

To reiterate, the broad punishment-phase special issues in Cole's case encompassed his mitigating evidence.[72] The issues also have a "common sense"[73] core of meaning: Was the killing deliberate? Is there a probability that Cole poses a threat of future dangerousness?[74] Furthermore, the trial court instructed the jury to consider "all of the

---

[69] *Boyde v. California* 494 U.S. 370, 380 (1990). *See also Johnson*, 509 U.S. at 368-69 (observing that constitutional error results only if mitigating evidence is unavoidably aggravating within the context of the special issues); *Saffle v. Parks*, 494 U.S. 484, 490-92 (1990) (precluding relief where there was no indication that the jury was "altogether prevented" from giving some effect to the evidence).

[70] *Richardson v. Marsh*, 481 U.S. 200, 211 (1987) (recognizing the presumption that the jury follows its instructions).

[71] *Boyde*, 494 U.S. at 380-381.

[72] *See Johnson*, 509 U.S. at 356; *Graham*, 506 U.S. at 463; *Franklin*, 487 U.S. at 168; *Jurek*, 428 U.S. at 266-67.

[73] *Pulley v. Harris*, 465 U.S. 37, 50 n.10 (1984).

[74] Tr 181.

evidence submitted . . . in the full trial of this case" in answering those questions.[75] Certainly, "all of the evidence submitted" includes Cole's mitigating evidence. And if any juror, after considering "all of the evidence" and the court's instructions, "had a reasonable doubt as to whether a Special Issue should be answered 'Yes,'" the punishment charge directed the juror to "vote 'No'" to that special issue.[76]

The prosecution strongly urged that the trial evidence compelled "Yes" answers to both special issues.[77] In response, defense counsel begged for mercy:

> I can't excuse the things that have happened in the past, and I'm not going to. I can't change that. . . . There's no guarantee [that Cole will burn out]. But there's no guarantee that anything else will ever happen. . . . There are a lot of people put in orphan's homes. Some of them turn out good. Some of them turn out bad. And I'm not excusing—I'm not using that for an excuse. That's just a mitigating circumstance. He was shuffled back and forth . . . His mother . . . saw him two times in five years. I have no idea what goes on in Ted's mind. None of you do. But how did that cause him to be at the point he is today? Is that his fault? I don't know.
>
> . . . Maybe [a central nervous system problem] caused some of it. I don't know.
>
> . . . He's been rejected everywhere. The only peace he ever finds is in the penitentiary. . . . He doesn't know how . . . to live out here in the street. . . . And I'm not saying we give him the opportunity. I don't want to give him the opportunity. But on the other hand, it's not right to kill him just to show that killing is wrong. . . .
>
> The right thing to do . . . is to answer those special issues in such a manner that he be sent to prison for life.
>
> . . . .
>
> . . . The State is asking you to kill Ted. Can you in all good conscience do that?

---

[75] Tr 176.

[76] Tr 175.

[77] 17 SR 870-9, 883-6.

> Look at all the evidence again. . . . Can we in all good conscience sentence him to death?
>
> Thank you, ladies and gentlemen.[78]

Contrary to Cole's assertion, those comments did not amount to "nullification."[79] Counsel did not ask the jury to ignore the evidence or misapply the law. Instead, counsel properly made an individualized case for mercy that was based on Cole's mitigating circumstances and in line with the trial court's instruction to vote "No" to any special issue that the jurors had a reasonable doubt about after considering "all of the evidence."[80]

Nor did the prosecution place the jury in an "ethical dilemma."[81] As the lower court correctly noted, Cole's prosecutor did not ask the jury to "respond[] falsely to a special issue,"[82] or argue that Cole's circumstances were more aggravating than mitigating.[83]

This Court has not found any constitutional violation under the circumstances this case presents and, absent a nullification instruction in *his* case, Cole's reliance on *Smith* and *Penry II* is misplaced.[84] Both of those cases involve nullification instructions, and neither

---

[78] 17 SR 879-83.

[79] Petition at 30.

[80] Tr 175.

[81] *Cole*, 418 F.3d at 508.

[82] *Id.*

[83] *Id.*

[84] *Smith*, 543 U.S. at 48 (explaining that a nullification instruction "'essentially instruct[s] [the jury] to return a false answer to a special issue in order to avoid a death sentence'") (quoting *Penry II*, 532 U.S. at 801); *Cole*, 418 F.3d at 508-9 (distinguishing *Smith* and *Penry II*). *See also Gregg v. Georgia*, 428 U.S. 253, 199 (1976) ("Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution.") and *Penry I*, 492 U.S. at 327 ("[S]o long as the class of murderers subject to

case speaks to Cole's situation, where the record supports the lower court's determination that, given its instructions, "the jury could have considered and given effect to Cole's mitigating evidence under the future dangerousness special issue."[85] The complained-of arguments fail to support a grant of relief in this case.

CONCLUSION

Jurek, *Graham*, and *Johnson* remain good law, and Cole has not demonstrated any fatal flaw in the state court's denial of relief or the lower court's AEDPA application. Because the special issues were broad enough to encompass Cole's mitigating evidence, this Court should deny certiorari review.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

KENT C. SULLIVAN
First Assistant Attorney General

DON CLEMMER
Deputy Attorney General
For Criminal Justice

GENA BUNN
Chief, Postconviction Litigation Division

*CARLA E. ELDRED
Assistant Attorney General

*Counsel of Record

---

capital punishment is narrowed, there is no constitutional infirmity in a procedure that allows a jury to recommend mercy based on the mitigating evidence introduced by a defendant.").

[85] *Cole*, 418 F.3d at 508.

P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
Tel: (512) 936-1400
Fax: (512) 320-8132
Email: carla.eldred@oag.state.tx.us

ATTORNEYS FOR RESPONDENT

File Date
8/14/2006

(9)

No. 05-11284

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2005

JALIL ABDUL-KABIR,
Petitioner,

-v-

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent.

REPLY TO BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

THIS IS A CAPITAL CASE.

RAOUL D. SCHONEMANN
3774 Harrison Street
Oakland, California 94611
(510) 654-1192
(415)904-5635 fax

*ROBERT C. OWEN
OWEN & ROUNTREE, L.L.P.
P.O. Box 40428
Austin, Texas 78704
(512) 804-2661
(512) 804-2685 fax

JORDAN M. STEIKER
727 E. Dean Keeton
Austin, Texas 78705
(512) 232-1346
(512) 232-2399 fax

* *Counsel of Record for Petitioner*
Member, Supreme Court Bar

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

SUMMARY OF ARGUMENT IN REPLY 1

1 **_Certiorari_ is warranted because the Fifth Circuit has conceded that its own decisions are in tension with Smith, indicating an urgent need for guidance before the Fifth Circuit goes any further down the wrong road** 4

2 **_Certiorari_ is warranted because the Fifth Circuit's decisions continue to take that court farther and farther from the course clearly charted by this Court in Smith** 6

3 **_Certiorari_ is warranted because the Fifth Circuit's basis for rejecting Petitioner's Penry I claim ignores the relevant mitigating qualities of Petitioner's evidence and is impossible to reconcile with Smith** 7

CONCLUSION AND PRAYER FOR RELIEF 9

TABLE OF AUTHORITIES

CASES

United States Supreme Court

Johnson v. Texas, 509 U.S. 350 (1993) 3, 4, 7

Penry v. Johnson, 532 U.S. 782 (2001) 4, 6

Penry v. Lynaugh, 492 U.S. 302 (1989) ..... *passim*

Smith v. Texas, 543 U.S. 37 (2004) ..... *passim*

Tennard v. Dretke, 542 U.S. 247 (2004) ..... *passim*

United States Courts of Appeals

Cole v. Dretke, 443 F.3d 441 (5th Cir. 2006) 4

Cole v. Dretke, 418 F.3d 494 (5th Cir. 2005) 7

Davis v. Scott, 51 F.3d 457 (5th Cir. 1995) 8

Garcia v. Quarterman, ___ F.3d ___, 2006 WL 1932895 (5th Cir. 2006) 2, 6, 7

In re Kunkle, 398 F.3d 683 (5th Cir. 2005) 4

Smith (R.G.) v. Dretke, 422 F.3d 269 (5th Cir. 2005) 4, 5

Tennard v. Dretke, 442 F.3d 240 (5th Cir. 2006) 5

State Courts

Ex parte Smith, 185 S.W.3d 455 (Tex. Crim. App. 2006) 5

Ex parte Smith, 132 S.W.3d 407 (Tex. Crim. App. 2004) 8

No. 05-11284

IN THE SUPREME COURT OF THE UNITED STATES
October Term 2005

JALIL ABDUL-KABIR,
Petitioner,

-v-

NATHANIEL QUARTERMAN, Director,
Texas Department Of Criminal Justice,
Correctional Institutions Division,
Respondent.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

SUMMARY OF ARGUMENT IN REPLY

Respondent boldly asserts that Petitioner's jury "concluded that nothing in his history – not his neurological impairment, not his absentee parents, not his childhood hardships – was sufficiently mitigating to warrant a life sentence for the murder." Brief in Opposition ("BIO") at 1. Nothing could be further from the truth. As Respondent later admits, Petitioner's jury *was never asked* whether the mistreatment Petitioner suffered as a child, or his serious mental disorders, were "sufficiently mitigating" to justify withholding the ultimate punishment. Instead, the jurors were asked solely whether the evidence about Petitioner's background raised a reasonable doubt as to the "deliberateness" of his crime or the likelihood of his future dangerousness. *See* BIO at 3 ("At the punishment phase, Cole's jury addressed two issues: whether the killing was deliberate and whether

'there was a probability that Cole posed a threat of future dangerousness'"). Precisely because Petitioner's jury was *not* instructed to consider the mitigating significance of his background evidence for his moral culpability, Petitioner's death sentence violates well-settled constitutional norms. *See, e.g.*, Penry v. Lynaugh, 492 U.S. 302 (1989) ("Penry I").

In addition to mischaracterizing the events of Petitioner's trial, Respondent minimizes the importance of the issue presented here, asserting reflexively that there is no "compelling reason" for the Court to grant review. BIO at 11 (citing Sup. Ct. R. 10). That claim flies in the face of the Fifth Circuit's demonstrated puzzlement about the plain language and import of Smith v. Texas, 543 U.S. 37 (2004) (*per curiam*) – where this Court declared that the sentencing charge in a capital case must "allow the jury to give *full* consideration and *full* effect to mitigating circumstances in choosing the defendant's appropriate sentence," and that the former Texas statute fails that test where the jury's consideration of the mitigating evidence is "tied to findings of deliberateness and future dangerousness that ha[ve] little, if anything, to do with" the relevant qualities of that evidence. Id. at 38 (emphasis in original; citation omitted), 48. Respondent's assertion also ignores the fact that other panels of the Fifth Circuit, even as their colleagues have expressed such uncertainty, have continued to give a suffocatingly narrow reading to Smith, construing it in light of the Fifth Circuit's own pre-Smith decisions, rather than the other way around. *See, e.g.*, Garcia v. Quarterman, ___ F.3d.___, 2006 WL 1932895 (5th Cir., July 13, 2006). Assuming this Court meant what it said in Smith, the aggressive efforts of the Fifth Circuit and the Texas state courts to limit Smith's reach are indeed a compelling reason for a grant of *certiorari* in Petitioner's case. *See* Sup. Ct. R. 10(c) (*certiorari* may be appropriate when "a United States court of appeals has decided an important question of federal law ... in a way that conflicts with relevant decisions of this Court").

Regarding the merits of Petitioner's Penry claim, Respondent does not dispute that Petitioner's jury heard extensive mitigating evidence establishing his destructive and turbulent family background, impaired impulse control, and organic neurological impairment. BIO at 4-5, 13-14. Respondent also admits that, respecting this evidence, the jury was asked only whether the evidence indicated Petitioner killed "deliberately" and would pose a "continuing threat to society." BIO at 3.

On these facts, the straightforward reasoning of Smith would appear to compel the conclusion that the state court's decision upholding Petitioner's death sentence was an objectively unreasonable application of Penry I. If the former Texas statute precluded Smith's jury from giving "*full* effect" to Smith's mitigating evidence – which was materially indistinguishable from Petitioner's[1] – it could do no better as a vehicle for considering Petitioner's evidence. Even if, as Respondent argues, the jury could conceivably have answered the "future dangerousness" question "no" based on generic testimony that dangerousness generally declines with age, such testimony had "little, if anything, to do with" the relevant mitigating qualities of Petitioner's *actual* evidence – that Petitioner was grievously mistreated as a child and, as a result, developed serious psychological and emotional disorders as an adult. *Cf.* Johnson v. Texas, 509 U.S. 350, 369 (1993) (charge must give jurors a "meaningful basis to consider the relevant mitigating qualities" of the defendant's evidence).

---

[1] Smith was nineteen years old; he had potentially organic learning disabilities and speech handicaps, an IQ of 78 and a history of special education classes. Smith, 543 U.S. at 41. Despite these handicaps, Smith had exhibited "exemplary" behavior in school. Id. Smith's father was involved with gang violence, and stole from the family to feed his own addiction to drugs. Id. Petitioner likewise had a "very rugged," "tough" and "painful" childhood, marked by neglect, abandonment, and mistreatment at the hands of alcoholic parents and grandparents, and his father, like Smith's, was a violent criminal. *See* Petition for Writ of Certiorari ("Petition") at 3-8. Like Smith, Petitioner suffers from organic neurological impairment and impaired impulse control, in addition to chronic depression and a "horribly distorted" personality as a result of the mistreatment he suffered as a child. Id. at 5-6.

As Judge Dennis argued in dissent below, the Fifth Circuit panel could reach the contrary conclusion only because it has made no effort in its post-Smith cases to take seriously the language of Smith and Penry II or to plumb the reasoning of those cases. As Judge Dennis pointed out, the Fifth Circuit's cases "erroneously denigrate[] the ... clearly established Supreme Court jurisprudence of Penry I ... specifically highlighted in Tennard and Smith." Cole v. Dretke, 443 F.3d 441, 443 (5th Cir. 2006) (Dennis, J., dissenting from denial of rehearing *en banc*). This Court should grant *certiorari* to correct the Fifth Circuit's "misinterpretation of Johnson v. Texas and Graham v. Collins," id., and to make clear that it means what it said in Smith.

1. *Certiorari* is warranted because the Fifth Circuit has conceded that its own decisions are in tension with Smith, indicating an urgent need for guidance before the Fifth Circuit goes any further down the wrong road.

One compelling reason to grant review here is that the Fifth Circuit has openly acknowledged its uncertainty about the meaning of Smith. *See* Petition 12-17. Soon after Smith, for example, the Fifth Circuit indicated that it understood Smith to be "limited to [evidence of] mental impairment," despite the absence of any such limitation in the text of this Court's opinion. *In re* Kunkle, 398 F.3d 683, 685 (5th Cir. 2005). The court below expressly added that whether Smith swept any more broadly was a question for *this* Court. Id. A few months later, in R.G. Smith v. Dretke, 422 F.3d 269 (5th Cir. 2005), the Fifth Circuit acknowledged that its prior Penry jurisprudence, which had held that mitigating evidence of "an impoverished background, growing up in a crime-infested environment and alcohol abuse" could be given adequate effect in answering the special issues, was in tension with Smith, where this Court indicated that at least two of those same factors had "little, if anything, to do with" the special issues. R.G. Smith, 422 F.3d at 287 n.8 (conceding that this Court's opinion in Smith appeared to take "the exact opposite" position from the Fifth Circuit's longstanding

view of Penry as essentially limited to cases involving evidence of mental retardation).

In a third decision in March 2006, the Fifth Circuit expressly acknowledged that "tension" exists between the "some effect" standard consistently applied in its own decisions and the emphatic "*full* consideration and *full* effect" standard declared by this Court in Penry II and Smith. *See* Tennard v. Dretke, 442 F.3d 240, 253 n.7 (5th Cir. 2006). As in R.G. Smith, however, the Fifth Circuit discounted the need to resolve that tension, breezily announcing that it would "leave it to other[s] to tidy the High Court's Augean stables." Id.

The Texas Court of Criminal Appeals ("CCA"), too, is "uncertain as to the Supreme Court's current Penry II jurisprudence." *Ex parte* Smith, 185 S.W.3d 455 (Tex. Crim. App. 2006) (denying Penry relief on remand from this Court). The CCA recognizes that "numerous post-Smith, post-Tennard Fifth Circuit cases have held that mitigating evidence [like that at issue in Smith] is fully encompassed by the Texas 'future dangerousness' or 'deliberation' special issues." Id. at 466 and n.35.[2]

Understandably, Respondent's Brief in Opposition completely ignores these cases. Collectively, they demonstrate that there is an urgent need for this Court to correct the Fifth Circuit's misreading of Smith *now*, before it goes too far in the wrong direction.[3]

---

[2] Smith's petition seeking review of the CCA's most recent decision in his case is pending before this Court *sub nom.* Smith v. Texas, No. 05-11304.

[3] The Fifth Circuit applied its baseless "constitutional relevance" test for mitigating evidence to deny Penry claims for nearly a decade before this Court struck down that rule as having "no foundation" in the Eighth Amendment. *See* Tennard v. Dretke, 542 U.S. 274 (2004). It would be regrettable if the Fifth Circuit's current and equally serious error – its misreading of Smith – essentially mooted this Court's recent efforts to set the jurisprudence straight.

2. *Certiorari* is warranted because the Fifth Circuit's decisions continue to take that court farther and farther from the course clearly charted by this Court in Smith.

As noted, in the absence of further guidance from this Court, the Fifth Circuit continues to veer from the course set in Smith. The most recent example of this trend is Garcia v. Quarterman, ___ F.3d.___, 2006 WL 1932895 (5th Cir., July 13, 2006). Garcia argued that the jury was unable to give mitigating effect to evidence that he had been repeatedly sexually abused before he was ten years old. *See* Garcia, 2006 WL 1932895 at *3 - *7 (describing penalty-phase evidence). Garcia's jury received only the two standard "deliberateness" and "future dangerousness" queries, plus a "nullification instruction." Id. at *7. The Fifth Circuit majority found no Penry error. While expressly disavowing any reliance on procedural default, the majority asserted flatly that defense counsel was *required to argue for jury nullification* at trial (*i.e.*, to demand that the jurors violate their oaths to answer the special issues honestly) in order to claim later that he was harmed by the preclusive effect of the unconstitutional charge. Id. at *8 ("Garcia cannot seek mitigating treatment for his childhood abuse because he did not do so before the jury .... We respectfully disagree with the dissent's position that any evidence of childhood abuse must be considered under Penry regardless of the context in which it was offered at trial").

As Garcia makes clear, the Fifth Circuit is busily crafting new "screening tests" to evade Smith. *See* Garcia, 2006 WL 1932895 at *14 (Benavides, J., dissenting) (criticizing majority's rationale as "an end run around Penry II," an "approach ... at odds at least with the spirit of Tennard" for introducing another "threshold screening test ... [with] no foundation in Supreme Court precedent"), id. at *15 ("Instead of following [Penry's] mandate, the majority creates another

threshold screen"). It has gone from upholding the use of "nullification" charges as vehicles for the consideration of mitigating evidence to actually *requiring* that defense counsel have argued for nullification before the jury as a condition of later raising a Penry claim. Garcia, *supra*.

The longer this Court waits to intervene, the more distorted and begrudging the Fifth Circuit's application of Smith is likely to become.

3. *Certiorari* is warranted because the Fifth Circuit's basis for rejecting Petitioner's Penry I claim ignores the relevant mitigating qualities of Petitioner's evidence and is impossible to reconcile with Smith.

Respondent echoes the Fifth Circuit in placing dispositive weight on the fact that Petitioner's own experts had testified that all offenders tend to "burn out" and become less violent as they age, and asserting that the jurors could have based a "no" answer to the future dangerousness question on that testimony. BIO at 6, 15-16; Cole, 418 F.3d at 506-07. This analysis is mistaken, first, because it ignores the testimony of those same experts that Petitioner was presently dangerous and would remain so until "years from now." RR XVII at 813. It also ignores the fact that since Petitioner was just 31 at the time of trial, and his experts forecast his "burnout" to occur around age "forty-five" or "fifty," a reasonable juror would have concluded that Petitioner posed a threat of dangerousness for the next 15 to 20 years. By Respondent's own analysis, if jurors credited that testimony – and concluded that Petitioner would likely remain dangerous for at least the next few years – then they had *no* vehicle for giving effect to the remainder of Petitioner's mitigating evidence about his destructive childhood and mental impairment. That cannot be a correct outcome under Penry.

More important, the view urged by Respondent and adopted by the Fifth Circuit fails to give effect to this Court's teaching in Johnson that the charge must permit jurors to give effect to the "relevant mitigating qualities" of the defendant's evidence. The "relevant mitigating quality" of an

abused background or mental disorder is *not* that it makes the defendant less dangerous, but that it reduces his moral culpability. *That* aspect of the evidence is not captured in any way by the fact that there may exist some remote possibility that the disorder may become less severe as the years pass. Nor, contrary to Respondent's view, is it captured by testimony that all people generally become less prone to violence as they age. *See, e.g.*, RR XVII at 813 (the "process of aging" produces this effect "in all of us"). The mitigating inference that arises from such generic testimony is true for *any* offender; it speaks to the likelihood that *most* offenders become less dangerous as they grow older. This inference is no less true of mentally healthy defendants from loving and supportive backgrounds than it is of Petitioner, shaped by a background of neglect and mistreatment and burdened by neurologically impaired impulse control. For that reason, the "future dangerousness" question gave the jury *no* vehicle for expressing the conclusion that the *unique constellation of specific mitigating circumstances present in Petitioner's background* reduced his moral culpability for the crime so as to call for a life sentence.

It is instructive to recall that this Court turned aside a very similar argument in Smith. The Texas Court of Criminal Appeals had found that the jury could have given mitigating effect to Smith's background evidence in answering the "future dangerousness" issue. *Ex parte* Smith, 132 S.W.3d 407, 412-16 (Tex. Crim. App. 2004). The CCA reached this conclusion because the evidence suggested that, notwithstanding his impairments (including his low IQ) and turbulent home life, Smith's "behavior in school was often 'exemplary.'" Smith, 132 S.W.3d at 415. Accordingly, the CCA held, the jury could have determined that Smith was able to "control his conduct" notwithstanding his impairments and answered the future dangerousness question "no." Smith, 132 S.W.3d at 415 and n. 27 (citing, *inter alia*, Davis v. Scott, 51 F.3d 457, 464 (5th Cir. 1995), for the

proposition that where a "defendant's difficult childhood background evidence did not demonstrate that he was unable to learn from his mistakes, but rather that he responded positively to a structured environment, [the] second special issue provided sufficient vehicle for jury's consideration of [that] evidence").

This Court emphatically rejected the CCA's conclusion that Penry I was satisfied because the former special issues permitted the jury to give such indirect and anemic mitigating effect to Smith's evidence. The fact that Smith might learn to control his behavior *despite* his impairments did not make the future dangerousness question an adequate vehicle for considering those impairments in mitigation, because that question "had little, if anything, to do with [Smith's] mitigation evidence." Smith, 543 U.S. at 48. In precisely the same fashion, the fact that the jury might conceivably have found that the threat of violence posed by Petitioner would decline over time as a result of predictable aging processes that happen to "all of us" does not mean that the "future dangerousness" issue provided a meaningful vehicle for them to assess Petitioner's personal culpability in light of his tormented background and mental impairment.

CONCLUSION AND PRAYER FOR RELIEF

The evidence at trial showed that Petitioner was neglected, abandoned, and mistreated as a child, and that as a result of those experiences he suffered from emotional and psychological disorders, including a marked lack of impulse control, as an adult. It also indicated that Petitioner suffers from organic neurological impairments that affect his behavior. All this evidence reduced Petitioner's culpability for the murder of Raymond Richardson, but none of it could be given meaningful mitigating effect under the narrow "deliberateness" and "future dangerousness" inquiries of the former Texas statute. The state court's decision upholding Petitioner's death sentence against

a Penry I challenge is objectively unreasonable when contrasted to the proper Penry I analysis as modeled by this Court.

Since Smith, the Fifth Circuit has repeatedly questioned whether this Court meant what it said in that *per curiam* opinion. *See supra*; *see also* Petition at 12-17. Consistent with those purported doubts, the court below has never taken Smith's straightforward language seriously. Accordingly, absent intervention by this Court, Smith's mandate will not be given effect in the Fifth Circuit. That outcome would undermine the overriding goal of rationality in capital sentencing. *See* Petition at 35-37.

For the reasons set forth above and in his Petition for Writ of Certiorari, Petitioner JALIL ABDUL-KABIR respectfully prays that this Court grant a writ of *certiorari* to give the judgment of the United States Court of Appeals for the Fifth Circuit in this case plenary review; in the alternative, Petitioner asks that the Court summarily reverse the judgment below; or grant such other relief as the interests of justice require, including holding Petitioner's case pending the outcome of any *other* case in which the Court grants review to consider the correct application of Penry, Tennard, and Smith.

Respectfully submitted,

* Robert C. Owen
Texas Bar No. 15371950
OWEN & ROUNTREE, L.L.P.
P.O. Box 40428
Austin, Texas 78704
512-804-2661 (voice)
512-804-2685 (fax)

Jordan M. Steiker
727 East Dean Keeton St.
Austin, Texas 78705-3299
512-232-1346 (voice)
512-232-2399 (fax)

Raoul D. Schonemann
3774 Harrison Street
Oakland, California 94611
510-654-1192 (voice)
415-904-5635 (fax)

* Counsel of Record for Petitioner
Member, Supreme Court Bar

ATTORNEYS FOR
JALIL ABDUL-KABIR

Supreme Court, U.S.
FILED
JUL 17 2006
OFFICE OF THE CLERK

No. 05-11284

In the Supreme Court of the United States

JALIL ABDUL-KABIR,

Petitioner,

v.

NATHANIEL QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONS DIVISION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

BRIEF OF DERYL MADISON, RONALD CHAMBERS, BILLY COBLE, FERNANDO GARCIA, CHARLES MINES, BILLY NELSON, JONATHAN REED, STEVEN RODRIGUEZ, AND ROY SMITH AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

CHRISTOPHER J. RICHART
Mayer, Brown, Rowe & Maw LLP
700 Louisiana St., Ste. 3600
Houston, TX 77002
(713) 238-3000

DAVID R. DOW
Counsel of Record
University of Houston Law Center
100 Law Center
Houston, Texas 77204
713-743-2171 (voice)
713-743-2131 (facsimile)

Counsel for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. This Court's *Penry* Jurisprudence Requires the Punishment Phase Jury to Have a Meaningful Vehicle to Consider and Give Effect to All of a Defendant's Mitigating Evidence. 2

II. The Fifth Circuit's Pre-*Tennard* Treatment of *Penry* Claims Limited *Penry I* to Its Facts. 6

III. The Fifth Circuit's Post-*Tennard* Jurisprudence Also Fails to Apply *Penry I* in a Manner Faithful to This Court's Decisions. 8

A. The Fifth's Circuit's Post-*Tennard* Approach to *Penry* Claims Based on Mental Health Problems or a Dysfunctional Childhood Upbringing Is Still Without a Basis in this Court's Precedents. 9

1. The Fifth Circuit Has Improperly Drawn a Distinction Between Treatable and Untreatable Mental Health Problems. 9

TABLE OF CONTENTS – continued

Page

2. The Fifth Circuit Has Minimized the Effects of the Petitioners' Mental Health Problems and Dysfunctional Childhood Environments to Deny Relief Even Though *Tennard* Specifically Rejects Such an Analysis. 12

B. The Fifth Circuit has Frequently Relied on Its Pre-*Tennard Penry* Decisions to Deny Relief, Sometimes Without Analyzing the Significant Impact *Tennard* and *Smith* had on That Body of Law. 15

C. The Fifth Circuit's Most Recent *Penry* Decision Applies a Novel Estoppel Theory to Deny Relief and Departs From the Precedents of Both This Court and the Fifth Circuit. 16

D. The Fifth Circuit Has Also Adopted a Narrow Reading of *Tennard* and *Smith* in Other Contexts 18

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

Cases

Barnard v. *Collins*,
958 F.2d 634 (5th Cir. 1992) 19

Bigby v. *Dretke*,
402 F.3d 551 (5th Cir. 2005),
cert. denied, 126 S. Ct. 239 (2005) 7, 13, 17

Blue v. *Cockrell*,
298 F.3d 318 (5th Cir. 2002) 6

Bower v. *Dretke*,
No. 03-40980, 2005 U.S. App. LEXIS 16891
(5th Cir. Aug. 11, 2005) (per curiam), *cert. denied*,
126 S. Ct. 1144 (2006) 9, 18, 19, 20

Boyd v. *Johnson*,
167 F.3d 907 (5th Cir. 1999) 19

Brewer v. *Dretke*,
442 F.3d 273 (5th Cir. 2006) (per curiam),
petition for cert. filed, __ U.S.L.W. __ (U.S.
May 30, 2006) (No. 05-11287) 8, 12, 13, 14, 16

California v. *Brown*,
479 U.S. 538 (1987) 9

Coble v. *Dretke*,
444 F.3d 345 (5th Cir. 2006) 8, 12, 14, 15, 19

Cole v. *Dretke*,
418 F.3d 494 (5th Cir. 2005) 8, 10, 14

TABLE OF AUTHORITIES – continued

Page(s)

Draughon v. *Dretke*,
427 F.3d 286 (5th Cir. 2005),
cert. denied, 126 S. Ct. 1577 (2006) 8, 13, 14

Draughon v. *Texas*,
831 S.W.2d 331 (Tex. Crim. App. 1992) (en banc), *cert. denied*, 126 S. Ct. 1577 (2006)..... 13

Franklin v. *Lynaugh*,
487 U.S. 164 (1988) 2, 5, 18

Garcia v. *Quarterman*,
No. 03-11097 (5th Cir. July 13, 2006) 16, 17, 18

Graham v. *Collins*,
506 U.S. 461 (1993) 14, 19

Graham v. *Collins*,
950 F.2d 1009 (5th Cir. 1992) (en banc), *aff'd*, 506 U.S. 461 (1993)..... 6, 7

Graham v. *Collins*,
896 F.2d 893 (5th Cir. 1990), *superseded on reh'g en banc*, 950 F.2d 1009 (5th Cir. 1992), *aff'd*, 506 U.S. 461 (1993) 6, 7

Hernandez v. *Johnson*,
248 F.3d 344 (5th Cir. 2001)..... 7, 16

Jackson v. *Dretke*,
450 F.3d 614 (5th Cir. 2006)..... 9, 19, 20

TABLE OF AUTHORITIES – continued

Page(s)

Johnson v. *Texas*,
509 U.S. 350 (1993) 5, 10, 11, 18

Jurek v. *Texas*,
428 U.S. 262 (1976) 5, 20

Lucas v. *Johnson*,
132 F.3d 1069 (5th Cir. 1998) 15, 16

Mayo v. *Lynaugh*,
893 F.2d 683 (5th Cir. 1990) 6

McKoy v. *North Carolina*,
494 U.S. 433 (1990) 19

Mines v. *Dretke*,
No. 03-11137, 2004 U.S. App. LEXIS 26259
(5th Cir. Dec. 16, 2004) 15

Nelson v. *Dretke*,
442 F.3d 282 (5th Cir. 2006) ..... *passim*

Payne v. *Tennessee*,
501 U.S. 808 (1991) 20

Penry v. *Lynaugh* ("*Penry I*"),
492 U.S. 302 (1989) ..... *passim*

Penry v. *Johnson* ("*Penry II*"),
532 U.S. 782 (2001) 1,2

Robertson v. *Cockrell*,
325 F.3d 243 (5th Cir. 2003) 1, 3, 6, 7

TABLE OF AUTHORITIES – continued

Page(s)

Robinson v. *Johnson*,
151 F.3d 256 (5th Cir. 1998) 15

Skipper v. *South Carolina*,
476 U.S. 1 (1986) 5, 14

Smith v. *Cockrell*,
311 F.3d 661 (5th Cir. 2002) 7

Smith v. *Dretke*,
422 F.3d 269 (5th Cir. 2005) 15

Smith v. *Texas*,
543 U.S. 37 (2004) (per curiam) ..... *passim*

Ex parte Smith,
132 S.W.3d 407 (Tex. Crim. App.), *rev'd*,
543 U.S. 37 (2004) 3

Summers v. *Dretke*,
431 F.3d 861 (5th Cir. 2005), *petition for cert. filed*, __ U.S.L.W. __ (U.S. Apr. 2006) (No. 05-11074) 9, 18, 19, 20

Tennard v. *Cockrell*,
284 F.3d 591 (5th Cir. 2002), *rev'd sub nom. Tennard* v. *Dretke*, 542 U.S. 274 (2004) 3, 4

Tennard v. *Dretke*, 542 U.S. 274 (2004) ..... *passim*

Ex parte Tennard,
960 S.W.2d 57 (Tex. Crim. App. 1997) (en banc) 3, 4

TABLE OF AUTHORITIES – continued

Page(s)

Woodson v. *North Carolina*,
420 U.S. 280 (1976) 11

Statutes

Tex. Code Crim. Proc. Ann. art 37.071 § 2(e)(1)
(Vernon Supp. 2005) 6

BRIEF OF DERYL MADISON, RONALD CHAMBERS, BILLY COBLE, FERNANDO GARCIA, CHARLES MINES, BILLY NELSON, JONATHAN REED, STEVEN RODRIGUEZ, AND ROY SMITH AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae are inmates currently incarcerated on Texas's death row.[2] *Amici curiae* were sentenced under the pre-1991 Texas death penalty statute and have habeas petitions pending in federal court that challenge the constitutionality of their death sentences based on the Court's decisions in *Penry* v. *Lynaugh*, 492 U.S. 302 (1989) ("*Penry I*"), *Penry* v. *Johnson*, 532 U.S. 782 (2001) ("*Penry II*"), *Tennard* v. *Dretke*, 542 U.S. 274 (2004), and *Smith* v. *Texas*, 543 U.S. 37 (2004) (per curiam). Contrary to the decisions of this Court, the Fifth Circuit has once again adopted a reading of *Penry I* that does violence to this Court's rulings and has and will result in an unconstitutional resolution of *Penry* claims. The correct application of the Court's death penalty jurisprudence is literally a matter of life and death for *amici curiae*.

SUMMARY OF ARGUMENT

For more than a decade, the Fifth Circuit applied its "constitutional relevance" test to deny relief to almost every federal habeas petitioner asserting a *Penry* claim. See *Robertson* v. *Cockrell*, 325 F.3d 243, 256 (5th Cir. 2003). In no uncertain terms, this Court rejected the constitutional relevance test, finding that it "has no basis in our

---

[1] No attorney for any party has authored this brief in whole or in part, and no person or entity other than the *amici curiae* and their counsel made any monetary contribution to the preparation or submission of this brief.

[2] Deryl Madison, Ronald Chambers, Billy Coble, Fernando Garcia, Charles Mines, Billy Nelson, Jonathan Reed, Steven Rodriguez, and Roy Smith.

precedents." *Tennard*, 542 U.S. at 287. The Court's decisions in *Tennard* and *Smith* simply reaffirm the Court's consistent holding that "full consideration of evidence that mitigates against the death penalty is essential if the jury is to give a 'reasoned *moral* response to the defendant's background, character, and crime.'" *Penry I*, 492 U.S. at 328 (quoting *Franklin* v. *Lynaugh*, 487 U.S. 164, 184 (1988) (O'Connor, J., concurring) (plurality opinion)). Despite this Court's command that the punishment phase jury in a capital murder case must be permitted "to give '*full* consideration and *full* effect to mitigating circumstances' in choosing the defendant's appropriate sentence," *Smith*, 543 U.S. at 38 (quoting *Penry II*, 532 U.S. at 797), the Fifth Circuit has continued to apply an unconstitutionally narrow reading of *Penry I* and its progeny. While different panels of the court have created confusion by relying on varying bases for rejecting *Penry* claims, the consistency lies in the essential refusal to implement the decisions of this Court. For these reasons, the Court should grant review in these cases.

ARGUMENT

I. This Court's *Penry* Jurisprudence Requires the Punishment Phase Jury to Have a Meaningful Vehicle to Consider and Give Effect to All of a Defendant's Mitigating Evidence.

In *Penry I*, the Court sustained an as-applied challenge to the pre-1991 Texas death penalty statute brought by a defendant who presented evidence that he was mentally retarded, had been abused as a child, and consequently had "poor impulse control and an inability to learn from experience." *Penry I*, 492 U.S. at 308. The Court held that in cases where "the jury [is] unable to fully consider the mitigating evidence introduced by a defendant in answering the special issues," *id.* at 321, even if such evidence has some relevance to the special issues, see *id.* at 322, a separate issue allowing the jury to give mitigating effect to all of the

defendant's evidence in determining punishment must be submitted. *Id.* at 328.

In the years after *Penry I* was decided, the Fifth Circuit honored the decision more in the breach than in the observance. Although this Court reviewed and redressed the tests that developed in the lower courts in the wake of *Penry I*, a brief review is necessary here to set the framework for the discussion revealing the similarities in the appellate court's pre- and post-*Tennard* jurisprudence.

The primary method used to reject *Penry* claims was the "constitutional relevance" test. Under this "screening test," *Tennard*, 542 U.S. at 283, a federal habeas petitioner asserting a *Penry* claim was required to show that he suffered from a uniquely severe permanent handicap through no fault of his own and that there was a nexus between this handicap and his crime. *Tennard* v. *Cockrell*, 284 F.3d 591, 595 (5th Cir. 2002), *rev'd sub nom. Tennard* v. *Dretke*, 542 U.S. 274 (2004).[3]

Few petitioners were able to meet the erroneous standard the Fifth Circuit applied to *Penry* claims. See *Robertson*, 325 F.3d at 256 (noting that between 1992 and 2002, of the forty-seven death penalty cases in which the defendant asserted a *Penry* claim, the Fifth Circuit rejected *Penry* claims forty-six times).[4] Of the forty-six petitioners

---

[3] Aggravating the damage done by the federal court, the Texas Court of Criminal Appeals followed the Fifth Circuit's lead, weighing the mitigating evidence presented by a habeas petitioner to determine whether he had presented evidence of abuse and mental impairment as severe as that suffered by Penry. See *Ex parte Smith*, 132 S.W.3d 407, 413-14 (Tex. Crim. App.) (following the Fifth Circuit's two-part "uniquely severe" and "nexus" test), *rev'd*, 543 U.S. 37 (2004); see also *Tennard*, 542 U.S. at 279 (discussing the analysis used by the Texas Court of Criminal Appeals in reviewing Tennard's state habeas petition).

[4] See also *Ex parte Tennard*, 960 S.W.2d 57, 64 (Tex. Crim. App. 1997) (en banc) (Meyers, J., concurring) (noting that "[i]n cases too numerous to mention, this Court has rejected" *Penry* claims premised on

identified in *Robertson*, 39 have been executed. See Texas Department of Criminal Justice, *Executed Offenders*, *at* http://www.tdcj.state.tx.us/stat/executedoffenders.htm (last visited July 15, 2006).

Tennard was one such case. The only evidence Tennard presented at the punishment phase of his trial was testimony from his parole officer that Tennard had a 67 IQ. *Tennard*, 542 U.S. at 277. During punishment phase closing arguments, defense counsel's primary argument was that Tennard's low intelligence and gullibility mitigated his culpability. *Id.* at 277-78. The Fifth Circuit rejected Tennard's *Penry* claim on the grounds that Tennard had failed to establish a nexus between his low intelligence and his crime and his mitigating evidence was not sufficiently similar to Penry's. *Tennard*, 284 F.3d at 597; see also *Ex parte Tennard*, 960 S.W.2d 57, 62-63 (Tex. Crim. App. 1997) (en banc).

This Court soundly rejected the restrictive screening test employed by the Fifth Circuit and held that the two statutory special issues that were submitted to Tennard's jury did not give the jury an adequate vehicle to consider and give effect to Tennard's evidence of low intelligence. *Tennard*, 542 U.S. at 287-88. This Court concluded that "the Fifth Circuit's screening test has no basis in our precedents and, indeed, is inconsistent with the standard we have adopted for relevance in the capital sentencing context," *id.* at 287, and emphatically rejected both the "uniquely severe permanent handicap" and "nexus" elements of the Fifth Circuit test. *Id.* at 289.

The Court reaffirmed that decision in *Smith*, which came to the Court after the Texas Court of Criminal Appeals ("TCCA") denied state post-conviction relief. Smith presented mitigating evidence of organic learning disabilities,

---

"alcoholism/drug abuse, troubled background, and certain types of mental illness" including schizophrenia and manic depression).

speech handicaps, a 78 IQ, placement in special education classes, and his father's drug addiction, involvement in gang violence, and theft of money from other family members. *Smith*, 543 U.S. at 41. The Court noted that Smith's mitigating evidence was relevant to the appropriateness of the death penalty regardless of the severity of his mental health problems. *Id.* at 44. The Court also held that by requiring Smith to demonstrate both a severe disability and a nexus between his mitigating evidence and his crime, the TCCA had "relied on a test we never countenanced and now have unequivocally rejected." *Id.* at 45 (emphasis omitted).

Tennard and *Smith* underscore the decision made fifteen years earlier in *Penry I*. Under the standard set forth in *Penry I*, a court addressing a claim that the jury was unable to give effect to a defendant's mitigating evidence need only determine whether the jury could have believed that the mitigating evidence "diminished [the defendant's] moral culpability and made imposition of the death penalty unwarranted" but "would be unable to give effect to that conclusion." *Penry I*, 492 U.S. at 323; see also *Tennard*, 542 U.S. at 287-88. An appellate court should not substitute its judgment for that of the jury in weighing the defendant's mitigating evidence to determine whether he has presented proof of childhood abuse or mental health problems severe enough to warrant a sentence less than death. *Tennard*, 542 U.S. at 286. Instead, as long as the defendant's mitigating evidence "might serve 'as a basis for a sentence less than death,'" *id.* at 287 (quoting *Skipper* v. *South Carolina*, 476 U.S. 1, 5 (1986)), and has "mitigating dimension beyond the impact it has" on the statutory special issues, or could only be considered as an aggravating factor under those issues, a habeas petitioner is entitled to *Penry* relief.[5] *Id.* at 288.

---

[5] *Amici curiae* are not suggesting that a separate mitigating instruction is required in all cases. *Johnson* v. *Texas*, 509 U.S. 350 (1993), *Franklin* v. *Lynaugh*, 487 U.S. 164 (1988) (plurality opinion), and *Jurek* v. *Texas*, 428 U.S. 262 (1976) (plurality opinion), plainly foreclose such a

II. The Fifth Circuit's Pre-*Tennard* Treatment of *Penry* Claims Limited *Penry I* to Its Facts.

In the post-*Penry I*, pre-*Tennard* era, the Fifth Circuit has consistently rejected, ignored, or misconstrued the mandate of *Penry I*. This has primarily been accomplished through the application of the "constitutional relevance" screening test soundly rejected by this Court in *Tennard*. 542 U.S. at 283 ("This test for 'constitutional relevance,' . . . appears to be applied uniformly in the Fifth Circuit to *Penry* claims."). Through the application of that unconstitutional screening test, the lower court denied relief to Texas death row inmates whose juries may not have been given an appropriate vehicle for the consideration of mitigating evidence that may have served as the basis for a sentence less than death. Attempting to characterize this Court's denials of petitions for a writ of *certiorari* as affirmations of its treatment of *Penry* claims, the Fifth Circuit neatly summarized the effects of the constitutional relevance test in *Robertson*: In the period between the lower court's decision in *Graham* v. *Collins*, 950 F.2d 1009 (5th Cir. 1992) (en banc), *aff'd*, 506 U.S. 461 (1993) (January 3, 1992) and the end of 2002, of the forty-seven cases addressed on the merits, only one—Michael Blue—was deemed to warrant relief. See *Robertson*, 325 F.3d at 256; *Blue* v. *Cockrell*, 298 F.3d 318 (5th Cir. 2002). In the period between this Court's decision in *Penry I* (June 26, 1989) and January 3, 1992, of the six cases the Fifth Circuit addressed, even peremptorily, on the merits, *Penry* relief was granted in only one, *Mayo v. Lynaugh*, 893 F.2d 683 (5th Cir. 1990).[6] In the year and a half following the

---

contention. However, it is equally plain from *Penry I* and its progeny that a separate mitigating evidence instruction *is* required in some cases. The Texas legislature solved the problem in 1991 by requiring the submission of a general mitigating evidence instruction in all cases. See Tex. Code Crim. Proc. Ann. art. 37.071 § 2(e)(1) (Vernon Supp. 2005).

[6] On remand from this Court, a panel of the Fifth Circuit also granted *Penry* relief in *Graham* v. *Collins*, 896 F.2d 893 (5th Cir. 1990). On rehearing *en banc*, the Fifth Circuit vacated the panel's decision and

Robertson Court's tally, (January 1, 2003 until *Tennard*), five *Penry* claims have been addressed on their merits, with one grant of relief in *Bigby* v. *Dretke*, 402 F.3d 551 (5th Cir. 2005), *cert. denied,* 126 S. Ct. 239 (2005).[7] Thus, of the roughly fifty-eight cases identified by the lower court and undersigned counsel where *Penry* claims were addressed on their merits, relief has been granted in a total of three cases (not counting *Graham*).[8]

While the sheer numbers are themselves notable, when combined with the recognition that the lower court has based their decisions on the uniform application of a screening test that has "no foundation in the decisions of this Court," *Tennard*, 542 U.S. at 283-84, those numbers become increasingly frightening and call for the scrutiny of this Court. Ultimately, the Fifth Circuit's pre-*Tennard Penry* jurisprudence, which refused to apply *Penry I* in any context that varied even slightly from the facts of that case, represents, at best, a significant misunderstanding of the principles on which *Penry I* was based and, at worst, an effort to affirm death sentences without regard to the requirements of the Constitution or the dictates of this Court's precedents. This trend has continued even after this Court's explicit holdings in *Tennard* and *Smith*.

---

reinstated the district court's denial of relief. *Graham* v. *Collins*, 950 F.2d 1009 (5th Cir. 1992).

[7] This does not and cannot account for the cases pending in the lower court on requests for a COA or petitions for rehearing or cases pending in this Court on petitions for a writ of *certiorari*.

[8] More recently, *Penry* relief has been denied despite evidence of childhood head injuries, low IQ, and possible retardation, *Smith* v. *Cockrell*, 311 F.3d 661 (5th Cir. 2002), childhood abuse and substance addiction, *Robertson* v. *Cockrell*, 325 F.3d 243 (5th Cir. 2003), and schizophrenia, *Hernandez* v. *Johnson*, 248 F.3d 344 (5th Cir. 2001), to name a few.

III. The Fifth Circuit's Post-*Tennard* Jurisprudence Also Fails to Apply *Penry I* in a Manner Faithful to This Court's Decisions.

In narrowing the categories of evidence—both quantitatively and qualitatively—that qualified as "*Penry*" evidence in the fifteen years following *Penry I*, the Fifth Circuit and the TCCA upheld scores of death sentences using a test that has "no basis" in this Court's jurisprudence. *Tennard*, 542 U.S. at 287. Regardless of whether the Fifth Circuit's refusal to apply *Penry I* was the product of a misreading of this Court's death penalty jurisprudence or a conscious effort to reach a particular outcome regardless of the decisions of this Court, this pattern has continued in the Fifth Circuit's post-*Tennard* decisions.

Since *Tennard* the Fifth Circuit has repeatedly rejected *Penry* claims raised by petitioners with evidence of serious mental health problems and dysfunctional childhood environments by focusing on the possibility that the petitioner might receive treatment, minimizing the extent of the petitioner's mental health problems or dysfunctional upbringing, and relying on its pre-*Tennard Penry* jurisprudence, often without a critical analysis of the effect *Tennard* and *Smith* had on that body of law. See *Coble* v. *Dretke*, 444 F.3d 345 (5th Cir. 2006); *Brewer* v. *Dretke*, 442 F.3d 273 (5th Cir. 2006) (per curiam), *petition for cert. filed*, __ U.S.L.W. __ (U.S. May 30, 2006) (No. 05-11287); *Nelson* v. *Dretke*, 442 F.3d 282 (5th Cir. 2006); *Cole* v. *Dretke*, 418 F.3d 494 (5th Cir. 2005); *Draughon* v. *Dretke*, 427 F.3d 286 (5th Cir. 2005), *cert. denied*, 126 S. Ct. 1577 (2006). As with its pre-*Tennard* approach to *Penry* claims, the reasons put forward by the Fifth Circuit to explain its unwillingness to apply *Penry I* to petitioners suffering from mental health problems or raised in dysfunctional childhood environments is without basis in this Court's precedents. See *Tennard*, 542 U.S. at 287.

A second group of post-*Tennard Penry* cases that does not deal with mental health problems or dysfunctional childhood environments also highlights the narrow view the Fifth Circuit has continued to take when considering *Penry* claims. See *Jackson* v. *Dretke*, 450 F.3d 614 (5th Cir. 2006); *Summers* v. *Dretke*, 431 F.3d 861 (5th Cir. 2005), *petition for cert. filed*, __ U.S.L.W. __ (U.S. Apr. 27, 2006) (No. 05-11074); *Bower* v. *Dretke*, No. 03-40980, 2005 U.S. App. LEXIS 16891 (5th Cir. Aug. 11, 2005) (per curiam), *cert. denied*, 126 S. Ct. 1144 (2006). The narrow approach the Fifth Circuit has taken towards these petitioners' *Penry* claims demonstrates a continuing unwillingness to adhere to this Court's understanding of what the Eighth Amendment requires in capital sentencing procedures.

A. The Fifth's Circuit's Post-*Tennard* Approach to *Penry* Claims Based on Mental Health Problems or a Dysfunctional Childhood Upbringing Is Still Without a Basis in this Court's Precedents.

1. The Fifth Circuit Has Improperly Drawn a Distinction Between Treatable and Untreatable Mental Health Problems.

Nothing in this Court's analysis of *Penry* claims supports the "treatable-untreatable" distinction used by the Fifth Circuit to deny relief in the vast majority of cases. As was true in the pre-*Tennard* era, the artificial distinction the Fifth Circuit has drawn between treatable and untreatable mental health problems also ignores the fundamental mitigating thrust of this type of evidence, "'the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.'" *Penry I*, 492 U.S. at 319 (quoting *California* v. *Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)). Thus, like the now defunct "constitutional relevance" test, the Fifth Circuit's "untreatability requirement" has no basis in the precedents of

this Court and is contrary to the basic principles underlying this Court's death penalty jurisprudence. See *Tennard*, 542 U.S. at 287-88.

The Fifth Circuit's distinction between treatable and untreatable mental health problems appears to have been derived from Penry's complete inability to learn from his mistakes, which necessarily would have caused the jury to view his evidence of intellectual and emotional impairment solely as aggravating. See *Cole*, 418 F.3d at 506-07 & n.54 (relying on *Penry I* to hold that because "Cole's mitigating evidence did not suggest that he was unable to learn from his mistakes," Cole's evidence of low IQ and an abusive background "fits well within the broad scope of the future dangerousness special issue"). Although the Court identified Penry's inability to learn from his mistakes as one of the reasons the pre-1991 special issues were constitutionally inadequate in his case, *Penry I*, 492 U.S. at 323-24, nothing in *Penry I*, *Tennard*, or *Smith* suggests that a petitioner's inability to learn from experience is a prerequisite for *Penry* relief. To the contrary, although Tennard, like Penry, had low intelligence, there is no suggestion in the Court's opinion that he was unable to learn from his mistakes. See *Tennard*, 542 U.S. at 277-78, 288-89. Similarly, although Smith suffered from learning disabilities and a low IQ, there was no evidence that he was completely unable to learn from his mistakes. See *Smith*, 543 U.S. at 41, 43-45. In addition, although Penry was unable to learn from his mistakes, *Penry I* contains no indication that his antisocial tendencies could not have been controlled or ameliorated by medication or counseling. See *Penry I*, 492 U.S. at 307-10.

In *Johnson* v. *Texas*, 509 U.S. 350, 369 (1993), the Court did draw a distinction between the transient nature Johnson's youth and Penry's inability to learn from his mistakes. However, neither *Tennard* nor *Smith* cited *Johnson* for the proposition that only permanent disabilities warrant *Penry* relief. In addition, youth, although indisputably relevant to

the appropriateness of the death penalty, *id.* at 367, is fundamentally different than other types of mitigating evidence. The purpose of the punishment phase of a capital murder trial is to make an "individualized assessment of the appropriateness of the death penalty" based on the "personal culpability of the criminal defendant." *Penry I*, 492 U.S. at 319. Youth, however, is a universal condition, the opposite of the "diverse frailties of humankind" that may warrant a sentence less then death based on the uniqueness of each individual defendant. See *Woodson* v. *North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion). Thus, although Johnson's youth was relevant to the future dangerousness inquiry, see *Johnson*, 509 U.S. at 368, it had no other legitimate mitigating significance.[9] Because of the unusual nature of youth as a mitigating factor, *Johnson* cannot be read as creating a bright line distinction between treatable and untreatable mental illnesses. Thus, neither Penry's inability to learn from his mistakes nor *Johnson*'s discussion of the transient nature of youth provides a convincing rationale for the Fifth Circuit's approach to *Penry* claims premised on mental health problems.

Aside from having no basis in the jurisprudence of this Court, the Fifth Circuit's distinction between treatable and untreatable mental health problems would also have encouraged bizarrely inverted trial behavior. Defendants would have had an incentive to argue that they were *untreatable* psychopaths in hopes of earning a general mitigating evidence instruction. On the other hand, the prosecution would have attempted to present evidence that the defendant's mental health problems were treatable, while still contending that the defendant would pose a threat to others regardless of his prospects for treatment. The Fifth

---

[9] A particular juror might have been inclined to impose a sentence less than death because of Johnson's youth solely on the basis of mercy or sympathy, but this is not an appropriate basis to refuse to impose a death sentence. See *Johnson*, 509 U.S. at 371-72.

Circuit's emphasis on treatability would have promoted this counter-intuitive, if not perverse, approach to the presentation of mitigating evidence, and it highlights a significant flaw in the Fifth Circuit's analysis of *Penry* claims premised on a petitioner's mental health problems. Because the Fifth Circuit's requirement that a habeas petitioner demonstrate that his mental health problems are not susceptible to treatment before obtaining *Penry* relief has no foundation in the decisions of this Court, the Court should grant review to remedy the lower court's systemic analytical errors in this entire class of cases.

2. *The Fifth Circuit Has Minimized the Effects of the Petitioners' Mental Health Problems and Dysfunctional Childhood Environments to Deny Relief Even Though Tennard Specifically Rejects Such an Analysis.*

In rejecting the Fifth Circuit's constitutional relevance test, this Court held that "to say that only those features and circumstances [of a defendant's character or crime] that a panel of federal appellate judges deems to be 'severe' (let alone 'uniquely severe') could have such a tendency [to mitigate the defendant's culpability] is incorrect." *Tennard*, 542 U.S. at 287. Nevertheless, the Fifth Circuit has implicitly resurrected a severity test in analyzing *Penry* claims based on mental health problems and a dysfunctional childhood environment.

For example, the Fifth Circuit rejected Coble's *Penry* claim because he failed to present evidence of the same "harsh physical abuse" to which Penry had been subjected. *Coble*, 444 F.3d at 362-63. In *Brewer*, the Fifth Circuit denied relief in part because it felt that Brewer's evidence of mental health problems was not "especially strong," even though Brewer had apparently been suicidal and had been voluntarily committed for depression only three months before his crime. *Brewer*, 442 F.3d at 275 n.1. The Fifth Circuit also denied Brewer relief based on his history of

abuse because the abuse to which Brewer was subjected did "not rise to the level of that at issue in *Penry*," even though Brewer's father hit him "'numerous' times" when he was a teenager. *Id.* at 279 n.16. Similarly, in *Nelson* the Fifth Circuit characterized Nelson's evidence that he suffered from borderline personality disorder as "trivial" and "scanty," even though it was supported by expert testimony. *Nelson*, 442 F.3d at 287. It also concluded that Nelson's abandonment by his mother was distinguishable from Penry's evidence of "severe physical abuse."[10] *Id.* at 286. In contrast, in *Bigby* the Fifth Circuit granted *Penry* relief, emphasizing that Bigby's paranoid schizophrenia was "severe, caused him to suffer delusions with respect to the actions and motivations of the people around him, . . . and significantly impacted his interpersonal relationship abilities." *Bigby*, 402 F.3d at 571. The court also noted that Bigby had even "irrationally tried to take the trial court judge hostage in the presence of armed bailiffs." *Ibid.*

The Fifth Circuit's focus on the severity of a petitioner's mental health problems and dysfunctional childhood environment and the quantity of the evidence supporting them, is inconsistent with *Tennard* and *Smith*. The gullibility Tennard demonstrated while committing a previous rape and the single IQ test that supported his claim of low intelligence,

---

[10] The Fifth Circuit also denied a *Penry* claim based on "abuse as a child and 'dysfunctional upbringing'" in *Draughon* because it believed Draughon's evidence could be given effect under the future dangerousness special issue. *Draughon* v. *Dretke*, 427 F.3d 286, 298 (5th Cir. 2005), *cert. denied*, 126 S. Ct. 1577 (2006). Draughon presented evidence that his step-father "for many years viciously beat his mother and sexually assaulted his sister" and expelled Draughon from the house on several occasions when he was a teenager, forcing him to fend for himself. *Draughon* v. *Texas*, 831 S.W.2d 331, 339 (Tex. Crim. App. 1992) (en banc), *cert. denied*, 126 S. Ct. 1577 (2006). The Fifth Circuit devoted little attention or analysis to Draughon's *Penry* claim, presumably because the court had already determined that he was entitled to a new guilt-innocence trial on an unrelated ineffective assistance of counsel claim. See *Draughon*, 427 F.3d at 297.

Tennard, 542 U.S. at 277-78, could hardly be described as "especially strong." See *Brewer*, 442 F.3d at 275 n.1. Tennard's mitigating evidence, which was not supported by any expert testimony, see *Tennard*, 542 U.S. at 277, was also much weaker than the "scanty" evidence of mental illness at issue in *Nelson*. See *Nelson*, 442 F.3d at 287. Similarly, Smith's IQ, which was between 75 and 78, *Smith*, 543 U.S. at 41, was significantly higher than Penry's IQ of 50-63. *Penry I*, 492 U.S. at 307-08. Nor is there any indication that Smith's learning disabilities, *Smith*, 543 U.S. at 41, were comparable to Penry's mental health problems. See *Penry I*, 492 U.S. at 308. Smith's evidence that his father was a drug addict and a gang member who frequently stole money from other family members, *Smith*, 543 U.S. at 41, was also not nearly as horrifying as Penry's evidence of severe beatings and neglect at an early age. See *Penry I*, 492 U.S. at 308-09.[11]

Nothing in *Penry I*, *Tennard*, or *Smith* suggests that these cases were intended to set forth a minimum level of mental impairment or childhood abuse or neglect a petitioner must demonstrate before obtaining *Penry* relief. To the contrary, *Tennard* explicitly rejected the idea that federal judges should reweigh a petitioner's mitigating evidence to determine whether, in their opinion, it warrants a sentence less than death. See *Tennard*, 542 U.S. at 287. The evidence of serious mental health problems and dysfunctional childhood environments presented by the petitioners in *Coble*, *Brewer*, *Nelson*, *Cole*, and *Draughon* is hardly as trifling as evidence of the number of times a prisoner will shower. See *Tennard*, 542 U.S. at 286 (citing *Skipper*, 476

---

[11] Because of the significant difference in the factual records of the respective cases, *Graham* v. *Collins*, 506 U.S. 461 (1993), is not analogous to *Coble*, *Brewer*, *Nelson*, *Cole*, and *Draughon*. For example, although Graham lived with his grandmother off and on when he was a child, he presented no evidence of physical abuse, neglect by his caretaker, or complete abandonment by his mother. See *Graham*, 506 U.S. at 464.

U.S. at 7 n.2). The Fifth Circuit's continued focus on the severity of a petitioner's mental health problems and dysfunctional childhood environment to deny *Penry* relief is inconsistent with *Tennard* and *Smith* and reminiscent of the constitutional relevance test this Court explicitly rejected.

B. The Fifth Circuit has Frequently Relied on Its Pre-*Tennard Penry* Decisions to Deny Relief, Sometimes Without Analyzing the Significant Impact *Tennard* and *Smith* had on That Body of Law.

Since *Tennard*, the Fifth Circuit has continued to rely on its pre-*Tennard* cases to reject *Penry* claims, often without a critical analysis of the effect *Tennard* and *Smith* had on its pre-*Tennard* jurisprudence. This suggests that the Fifth Circuit either remains confused as to the scope of *Penry I* and its progeny or is simply unwilling to implement this Court's mandate.[12]

For example, in *Coble*, the court acknowledged that *Tennard* and *Smith* "significantly altered our circuit's analysis of mitigating evidence offered by a defendant in a capital case." *Coble*, 444 F.3d at 358 n.11. However, the court then relied on two of its pre-*Tennard* cases, *Lucas* v. *Johnson*, 132 F.3d 1069 (5th Cir. 1998), and *Robinson* v. *Johnson*, 151 F.3d 256 (5th Cir. 1998), to hold that Coble was not entitled to *Penry* relief because his mental health problems could be treated. See *Coble*, 444 F.3d at 361-62. The court did not discuss whether *Lucas* and *Robinson* remained good law after *Tennard* and *Smith*. *Ibid.* *Nelson*, in turn, simply relied on *Coble* to reject Nelson's *Penry* claim based on his borderline personality disorder. See *Nelson*, 442 F.3d at 287. The Fifth Circuit also rejected Nelson's

---

[12] The Fifth Circuit has granted a COA in two cases raising *Penry* claims specifically to consider the effect *Tennard* and *Smith* had on the court's *Penry* jurisprudence. See *Smith* v. *Dretke*, 422 F.3d 269, 287 (5th Cir. 2005); *Mines* v. *Dretke*, No. 03-11137, 2004 U.S. App. LEXIS 26259, at *30 (5th Cir. Dec. 16, 2004).

claim for relief based on maternal abandonment on the basis of *Graham* and several pre-*Tennard* cases without mentioning *Smith* or the type of dysfunctional childhood environment involved in that case.[13] See *id.* at 286. In *Brewer*, the Fifth Circuit cited *Lucas* and *Hernandez* v. *Johnson*, 248 F.3d 344 (5th Cir. 2001), for the proposition that a treatable mental illness does not require *Penry* relief. *Brewer*, 442 F.3d at 280 & n.18. The *Brewer* court dismissed *Tennard*, reasoning that *Tennard* "overturned only Fifth Circuit methodology for determining what mitigating evidence is constitutionally relevant," *id.* at 280 n.18, without addressing *Tennard*'s conclusion that Tennard's mitigating evidence, like Penry's, had a mitigating dimension beyond the deliberateness and future dangerousness special issues. See *Tennard*, 542 U.S. at 288-89. *Brewer* also failed to discuss, or even mention, *Smith*.

The Fifth Circuit's often cursory and uncritical analysis of the continuing validity of its pre-*Tennard Penry* cases suggests that the lower court continues to be confused about or is unwilling to accept *Penry I*, *Tennard*, and *Smith*. *Tennard* and *Smith* did fundamentally alter the Fifth Circuit's approach to mitigating evidence under the pre-1991 statute, a reality the Fifth Circuit seems unwilling to acknowledge. See *Smith*, 543 U.S. at 45; *Tennard*, 542 U.S. at 287-88.

C. The Fifth Circuit's Most Recent *Penry* Decision Applies a Novel Estoppel Theory to Deny Relief and Departs from the Precedents of Both This Court and the Fifth Circuit Itself.

In *Garcia* v. *Quarterman*, No. 03-11097, slip op. at 12-13 (5th Cir. July 13, 2006), the Fifth Circuit denied relief to a petitioner who asserted a *Penry* claim based on evidence of

---

[13] The Fifth Circuit did briefly discuss *Tennard*. It noted that because the Fifth Circuit cases on which it relied did not use the constitutional relevance test to deny the petitioners' *Penry* claims based on childhood neglect or abandonment, those cases remained good law. See *Nelson*, 442 F.3d at 286 n.6.

numerous incidents of sexual abuse that occurred before the age of ten and untreatable psychological defects.[14] *Id.* at 10-11. However, the majority[15] denied Garcia relief because his attorney did not argue in closing that the jury should give "independent mitigating effect" to Garcia's history of sexual abuse and psychological defects beyond the scope of special issues. See *id.* at 15. Essentially, the *Garcia* majority rejected Garcia's *Penry* claim because defense counsel failed to premise his closing argument on a general mitigating evidence instruction the trial court had already refused to submit, *id.* at 27-28 (Benavides, J., dissenting), or the nullification instruction that admittedly would not have cured any constitutional defect in the special issues. *Id.* at 32-33 (Benavides, J., dissenting); see also *id.* at 19 n.13 (acknowledging that the nullification instruction would not have cured any deficiencies in the special issues). The majority's estoppel theory is completely unsupported by precedent. *Id.* at 34 (Benavides, J., dissenting) ("[T]he majority cannot cite a single authority, Supreme Court or otherwise, in support of its estoppel theory . . . .").

In addition, Garcia's psychological defects were "permanent and involuntary," *id.* at 18, and the State offered unrebutted expert testimony that Garcia would probably not respond to treatment. See *id.* at 10-11. Under the Fifth Circuit's own precedent, the untreatability of Garcia's condition would require relief. See *Bigby*, 402 F.3d at 571. Nevertheless, the Fifth Circuit concluded that Garcia's condition could not be viewed as "morally mitigating of guilt." *Garcia*, No. 03-11097, slip op. at 18. Pedophilia understandably inspires horror and loathing, but to the extent it is an involuntary condition that causes a defendant to have

---

[14] Both the State and the defense expert diagnosed Garcia as a pedophile. *Garcia* v. *Quarterman*, No. 03-11097, slip op. at 12 (5th Cir. July 13, 2006).

[15] *Garcia* was authored by Chief Judge Jones, the same judge who wrote *Robertson*, which explicitly adopted the constitutional relevance test.

an "uncontrollable compulsion to commit" antisocial acts, see *ibid.*, it is mitigating, even though it does not inspire sympathy.[16] *Garcia* cannot be viewed as anything other than a results oriented decision that contravenes the precedents of both this Court and the Fifth Circuit itself.

D. The Fifth Circuit Has Also Adopted a Narrow Reading of *Tennard* and *Smith* in Other Contexts.

The Fifth Circuit has imposed a narrow interpretation of *Penry*, *Tennard*, and *Smith* on mitigating evidence other than mental health problems and a dysfunctional childhood environment. Unlike the Fifth Circuit's current approach to *Penry* claims based on mental health problems and childhood abuse, abandonment, or neglect, the Fifth Circuit's decisions in this latter class of cases applies a narrow reading of *Penry I* that is symptomatic of the lower court's reluctance to abandon its previous approach to *Penry* claims and indicates continuing refusal to follow this Court's guidance with respect to the scope of *Penry I* and its progeny.

Summers and *Bower*, for example, both dealt with evidence of the petitioners' positive character traits. Summers presented evidence of "his nonviolent nature and general good character" and "his grief for his parents' death."[17] *Summers*, 431 F.3d at 882. Bower presented evidence that "he was a good and decent family man, who up until his arrest, had never been in trouble with the law." *Bower*, 2005 U.S. App. LEXIS 16891, at *16. The Fifth

---

[16] "Mitigation" and "sympathy" are not synonymous. See *Johnson*, 509 U.S. at 368, 371-72 (observing that the defendant's evidence of youth was mitigating and moving *and* that the jury should not be permitted to "dispense mercy on the basis of a sympathetic response to the defendant").

[17] Summers also presented evidence of his "ability to conform to prison life." *Summers*, 431 F.3d at 882. However, this evidence appears to be indistinguishable from the petitioner's clean prison disciplinary record in *Franklin*, 487 U.S. at 177-80, in which this Court found that the two pre-1991 special issues were constitutionally adequate.

Circuit rejected both Summers's and Bower's *Penry* claims relying principally on *Coble*, *Boyd* v. *Johnson*, 167 F.3d 907 (5th Cir. 1999), and *Barnard* v. *Collins*, 958 F.2d 634 (5th Cir. 1992). See *Summers*, 431 F.3d at 882-83; *Bower*, 2005 U.S. App. LEXIS 16891, at *16-17. *Summers* also cited *Graham* extensively. *Summers*, 431 F.3d at 883. In both cases, the court concluded that good character evidence simply shows that the defendant's crime was an atypical aberration from his normal behavior that was unlikely to recur and thus could be given adequate consideration under the future dangerousness special issue. See *id.* at 882; *Bower*, 2005 U.S. App. LEXIS 16891, at *17. The Fifth Circuit is apparently under the impression that its conclusion in these cases is consistent with *Graham*. *See Graham* v. *Collins*, 506 U.S. 461, 476-77 (1993). However, this Court has never addressed the application of *Penry I* to good character evidence outside the narrow confines of the retroactivity analysis involved in *Graham*. See *Graham*, 506 U.S. at 472.

Jackson also addressed the limits of *Penry I*. In *Jackson*, the trial court refused to allow Jackson to introduce evidence of the effect his execution would have on his friends and family. *Jackson*, 450 F.3d at 615. Without discussing *Tennard* and over a vigorous dissent by Judge Dennis, the Fifth Circuit upheld Jackson's death sentence. However, testimony from a defendant's friends and family that they value the defendant's life and would mourn his death permits an inference that the defendant had some connection to civilized society. Thus, Jackson's "execution impact" evidence, *ibid.*, was certainly admissible under *Tennard*'s broad view of relevance. See *Tennard*, 542 U.S. at 284 (holding that evidence is relevant at the punishment phase of a capital murder trial if it has "'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence'" (quoting *McKoy* v. *North Carolina*, 494 U.S. 433, 440 (1990))). In addition,

when extensive victim impact evidence is introduced, as it was in *Jackson*, execution impact evidence may be necessary "to avoid 'unfairly weighting the scales in a capital trial'" against the defendant. *Jackson*, 450 F.3d at 621 (Dennis, J., dissenting) (quoting *Payne* v. *Tennessee*, 501 U.S. 808, 822 (1991)).

Summers, *Bower*, and *Jackson* demonstrate that the Fifth Circuit continues to struggle with *Penry I* and its progeny and the relationship of that line of cases to *Jurek* v. *Texas*, 428 U.S. 262 (1976) (plurality opinion), and the other cases from this Court that have upheld the constitutionality of the pre-1991 Texas death penalty statute. Although the number of individuals this body of law effects continues to shrink, to the inmates who were sentenced under the pre-1991 Texas death penalty statute, the proper determination of these issues remains of critical interest.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

CHRISTOPHER J. RICHART
Mayer, Brown, Rowe & Maw LLP
700 Louisiana St., Ste. 3600
Houston, TX 77002
(713) 238-3000

DAVID R. DOW
Counsel of Record
University of Houston Law Center
100 Law Center
Houston, Texas 77204
713-743-2171 (voice)
713-743-2131 (facsimile)

Counsel for Amici Curiae

JULY 17, 2006

Supreme Court, U.S.
FILED
NOV 29 2006
OFFICE OF THE CLERK

No. 05-11284

In The Supreme Court of the United States

JALIL ABDUL-KABIR, formerly known as TED CALVIN COLE,

Petitioner,

v.

NATHANIEL QUARTERMAN, Director, Texas Department of Criminal Justice, Correctional Institutions Division,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RECEIVED
DEC 4 - 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

JOINT APPENDIX

ROBERT C. OWEN
CAPITAL PUNISHMENT CENTER
UNIVERSITY OF TEXAS
SCHOOL OF LAW
727 East Dean Keeton
Austin, TX 78705-3299
(512) 232-9391
(512) 232-9171 (facsimile)

Counsel of Record for Petitioner

EDWARD L. MARSHALL
Assistant Attorney General
Office of the Attorney General
P.O. Box 12548
Austin, TX 78711-2548
(512) 936-1600
(512) 320-8132 (facsimile)

Counsel of Record for Respondent

Petition For A Writ Of Certiorari Filed May 30, 2006
Certiorari Granted October 13, 2006

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

Docket Sheet, *Cole v. Dretke,* No. 00-CV-14, U.S. District Court, Northern District of Texas 1

Docket Sheet, *Cole v. Dretke,* No. 01-10646, U.S. Court of Appeals for the Fifth Circuit..... 4

Trial testimony of Dr. Richard Coons, *State of Texas v. Ted Calvin Cole*, No. CR88-0043-A, 51st Judicial District Court of Tom Green County, Texas (June 4, 1988)..... 9

Trial testimony of Nancy Doris Hickey, *State of Texas v. Ted Calvin Cole,* No. CR88-0043-A, 51st Judicial District Court of Tom Green County, Texas (June 4, 1988)..... 34

Trial testimony of Barbara Dean, *State of Texas v. Ted Calvin Cole,* No. CR88-0043-A, 51st Judicial District Court of Tom Green County, Texas (June 4, 1988)..... 55

Trial testimony of Jarvis Wright, *State of Texas v. Ted Calvin Cole,* No. CR88-0043-A, 51st Judicial District Court of Tom Green County, Texas (June 4, 1988)..... 60

Trial testimony of Dr. Wendell Dickerson, *State of Texas v. Ted Calvin Cole*, No. CR88-0043-A, 51st Judicial District Court of Tom Green County, Texas (June 4, 1988)..... 88

Defendant's Objections to Punishment Phase Jury Charge, *State of Texas v. Ted Calvin Cole,* No. CR88-0043-A, 51st Judicial District Court of Tom Green County, Texas (June 4, 1988) 115

TABLE OF CONTENTS – Continued

Page

Penalty Phase Jury Charge and Jury Verdict, *State of Texas v. Ted Calvin Cole,* No. CR88-0043-A, 51st Judicial District Court of Tom Green County, Texas (June 4, 1988) 125

Penalty Phase Closing Arguments, *State of Texas v. Ted Calvin Cole*, No. CR88-0043-A, 51st Judicial District Court of Tom Green County, Texas (June 4, 1988) 131

Trial Court's Findings on State Habeas, *State of Texas v. Ted Calvin Cole,* No. CR88-0043-A, 51st Judicial District Court of Torn Green County, Texas (May 10, 1999) 149

Opinion on State Habeas, *Ex parte Cole,* No. 41,673-01 (Tex.Crim.App. 1999) (unpublished decision), Texas Court of Criminal Appeals (November 24, 1999) 178

Opinion on Federal Habeas, *Cole v. Johnson,* No. 6:00-CV-014-C (N.D. Texas 2001) (not reported), U.S. District Court, S.D. Tx. (March 5, 2001) 180

Opinion on Federal Habeas Appeal, *Cole v. Dretke,* No. 01-10646, 418 F.3d 494 (5th Cir. 2005), U.S. Court of Appeals, 5th Circuit (July 22, 2005) 219

Order Granting *In Forma Pauperis* Status and Writ of Certiorari, *Cole v. Quarterman,* No. 05-11284, 2006 WL 1523202, U.S. Supreme Court (October 13, 2006) 251

DOCKET ENTRIES
U.S. District Court
Northern District of Texas (San Angelo)
CIVIL DOCKET FOR CASE #: 00-CV-14
Cole v. Johnson

* * *

2/10/00	4	ORDER granting [2-1] motion for appointment of counsel, denying [2-2] motion to extend time (for 120 days to file petition for writ of habeas corpus), granting [1-1] motion to proceed in forma pauperis; all other relief requested DENIED; (signed by US Dist Jd Cummings) Copies to counsel: 2/10/00 Page(s) 2 (mrr)

* * *

6/1/00	18	PETITION for writ of habeas corpus; Date Received: 6/1/00 (54) (blr)

* * *

7/5/00	22	ANSWER to Complaint by respondent Gary Johnson (Attorney Katherine D Hayes), (72) (mrr) [Edit date 07/05/00]
7/5/00	22	MOTION with memorandum in support by respondent Gary Johnson for summary judgment (72) (mrr)

* * *

7/25/00	24	MEMORANDUM by petitioner Ted Calvin Cole in opposition to [22-1] answer, [22-1] motion for summary judgment (22) (blr)

* * *

3/6/01	52	ORDER denying [18-1] petition for Writ of Habeas Corpus *claims unsupported by specifics are subject to summary dismissal; state court determination should be upheld for failure of Pet to prove objectively unreasonable; Pet not prejudiced by appellate counsel's deficient performance on direct appeal; all relief not expressly granted is denied; SEE ORDER FOR SPECIFICS (Signed by Judge Sam R. Cummings) Copies to counsel, Gov Office, Atty Gen, Warden Walls Unit, Director TDCJ, Sup Ct Clerk, Ct Apps 5th Circ Clerk, (via fax & mail) (telephoned above to notify of Order/Jdgment): 3/6/01 Page(s) 37 (blr) [Edit date 03/06/01]
3/6/01	53	JUDGMENT that Petitioner's Petition for Writ of Habeas Corpus is DENIED & cause is DISMISSED w/prejudice (Signed by Judge Sam R. Cummings) Copies to counsel: 3/6/01 Page(s): 1 (blr)

* * *

5/18/01	57	NOTICE OF APPEAL by petitioner Ted Calvin Cole re [53-1] judgment order, [56-1] order Appeal record due on 6/4/01 (blr)

* * *

5/30/01	59	CERTIFICATE OF APPEALABILITY & ORDER – Petitioner should be allowed to proceed in forma pauperis on appeal; Petitioner's [58-1] motion for certificate of appealability should be DENIED for reasons stated in Order & Judgment filed 3/6/01; (Signed by Judge Sam R. Cummings) Copies

to counsel: 5/30/01 Page(s) 1 (mrr) [Edit date 05/30/01]

* * *

DOCKET ENTRIES
US Court of Appeals for the Fifth Circuit
Court of Appeals Docket #: 01-10646
Cole v. Dretke

* * *

11/19/01 Motion filed by Appellant Ted Calvin Cole for certificate of appealability [3432862-1] Motion due ddl satisfied. Sufficient [Y/N]: Y. [01-10646] (mrw)

11/19/01 Brief filed in support of motion for Certificate of Appealability [3432862-1] by Appellant Ted Calvin Cole Brief in Support ddl satisfied. [3432873-1] [01-10646] (mrw)

* * *

1/22/02 Response/opposition filed by Appellee Janie Cockrell to motion for Certificate of Appealability [3432862-1] by Appellant Ted Calvin Cole Response/Opposition ddl satisfied. Sufficient [Y/N]: N over page limitation. [3489528-1] [01-10646] (mrw)

* * *

2/27/02 Reply filed by Appellant Ted Calvin Cole to response/opposition [3489528-1], motion for Certificate of Appealability [3432862-1] Sufficient [Y/N]: y. [3621950-1] [01-10646] (mrw)

* * *

8/13/03 COURT Order filed granting in part motion for Certificate of Appealability (IN DETAIL). Also COA GRANTED SUA SPONTE ON PROCEDURAL-DEFAULT ISSUE. [3432862-1] (PEH-JLW-RHB) Copies to all counsel. [01-10646] (mrw)

* * *

9/24/03 Appellant's Brief filed by Appellant Ted Calvin Cole. Copies of Brief: 7 # of pages: 57 Word count: 13,883 Date of COS: 9/22/03 Disk Provided [Y/N]: Y Sufficient [Y/N]: Y. [4618836-1] [01-10646] A/Pet's Brief ddl satisfied. E/Res's Brief due on 10/24/03 for Doug Dretke. (jbr)

* * *

10/27/03 Appellee's Brief filed by Appellee Doug Dretke. Copies of Brief: 7 # of pages: 48 Word count: 13,353 Date of COS: 10/24/03 Disk Provided [Y/N]: Y Sufficient [Y/N]: Y. [4650005-1] [01-10646] E/Res's Brief ddl satisfied. Reply Brief due on 11/10/03 for Ted Calvin Cole. (mrw)

11/10/03 Reply brief filed by Appellant Ted Calvin Cole. Copies of Brief: 7 # of pages: 28 Word count: 6,639 Date of COS: 11/10/03. Disk Provided [Y/N]: Y. [4662764-1] [01-10646] Reply Brief ddl satisfied. (jbr)

11/10/03 Motion to reconsider denial of certificate of appealability on appellant's Penry claim filed by Appellant Ted Calvin Cole. [4662825-1] [3432862-1] Date of COS: 11/7/03. [01-10646] (jbr)

* * *

11/14/03 Response/opposition filed by Appellee Doug Dretke to motion for reconsideration [4662825-1] by Appellant Ted Calvin Cole Response/ Opposition ddl satisfied. Date of COS: 11/13/03 Sufficient [Y/N]: Y. [4668423-1] [01-10646] (mrw)

11/19/03 COURT Order filed. Appellant's motion to reconsider denial of certificate of appealability on appellant's Penry claim is carried with the

appeal. [4662825-1] (PEH-JLW-RHB) Copies to all counsel. [01-10646] (jbr)

11/19/03 COURT Order filed granting motion to amend caption. [4662858-1] (JLW) Copies to all counsel. [01-10646] (jbr)

* * *

11/19/03 Reply filed by Appellant Ted Calvin Cole to respondent's opposition to motion to reconsider denial of certificate of appealability. [4668423-1] [4672385-1] [01-10646] (jbr)

* * *

11/20/03 Oral argument heard. Case argued by Robert Charles Owen for Appellant Ted Calvin Cole, Katherine D Hayes for Appellee Doug Dretke [01-10646] (pft)

* * *

5/19/04 COURT Order filed denying appellant's motion for reconsideration. (HANDLED IN OPINION) [4662825-1] (PEH,JLW,RHB) Copies to all counsel. [01-10646] (jma)

5/19/04 Judgment entered and filed. [01-10646] (jma)

* * *

11/22/04 Supreme Court order received granting petition certiorari [4923790-1] by Appellant Ted Calvin Cole on 11/15/04. [01-10646] (cav)

* * *

1/14/05 Supplemental brief filed by Appellant Ted Calvin Cole. Copies of Brief: 7 # of pages: 37 Date of COS: 1/7/05 Disk Provided [Y/N]: Y Sufficient [Y/N]: N over page limitation and cover should be tan. [5053316-1] [01-10646]

A/Pet Supplemental Brief ddl satisfied. Sufficient Brief due on 1/24/05 for Ted Calvin Cole. (mrw)

1/21/05 Supplemental brief filed by Appellee Doug Dretke Copies of Brief: 7 # of pages: 16 Word count: 4,128 Date of COS: 1/20/05 Disk Provided [Y/N]: Y Sufficient [Y/N]: Y. [5058858-1] [01-10646] E/Res Supplemental Brief ddl satisfied. (mrw)

* * *

2/2/05 Response/opposition filed by Appellant Ted Calvin Cole to brief(s) [5069025-1] by Appellee Doug Dretke Sufficient [Y/N]: Y [5069025-1] [01-10646] (mrw)

* * *

4/21/05 Supplemental memorandum filed by Appellant Ted Calvin Cole [5143322-1] [01-10646] (mrw)

4/21/05 Supplemental memorandum filed by Appellee Doug Dretke [5143323-1] [01-10646] (mrw)

5/11/05 Oral argument heard. Case argued by Robert Charles Owen for Appellant Ted Calvin Cole, Carla Elaina Eldred for Appellee Doug Dretke [01-10646] (vlb)

* * *

7/22/05 Opinion filed. Issd in T form? Y Mandate pull date is 8/12/05. [01-10646] (rmf)

7/22/05 Judgment entered and filed. [01-10646] (rmf)

* * *

8/4/05 Petition filed by Appellant Ted Calvin Cole for rehearing en banc. # of copies filed: 20 [5249433-1] Mandate pull date canceled. Date

of COS: 8/3/05 Sufficient [Y/N]: Y [01-10646] (mrw)

* * *

3/17/06 COURT Order filed denying appellant's petition for rehearing en banc [5249433-1] With poll (Y/N)?: y JLD dissenting, with whom CDK, joins Mandate pull date is 3/24/06. Copies to all counsel. [01-10646] (jma)

* * *

****

CAUSE NUMBER CR88-0043-A

THE STATE OF TEXAS	> IN THE DISTRICT COURT OF
VERSUS	> TOM GREEN COUNTY, TEXAS
TED CALVIN COLE	> 51ST JUDICIAL DISTRICT

****

* * *

[745] THEREUPON,

RICHARD E. COONS

WAS CALLED AS A WITNESS ON BEHALF OF THE STATE AND, HAVING BEEN FIRST DULY SWORN, TESTIFIED AS FOLLOWS, TO-WIT:

DIRECT EXAMINATION

BY MR. SMITH:

Q SIR, WOULD YOU STATE YOUR FULL NAME FOR THE RECORD?

A YES. "RICHARD E. COONS," C-O-O-N-S.

Q SIR, HOW ARE YOU EMPLOYED OR SELF-EMPLOYED OR . . . ?

A I PRACTICE GENERAL PSYCHIATRY IN AUSTIN.

Q SIR, COULD YOU STATE YOUR EDUCATIONAL CREDENTIALS, PLEASE?

A YES. EXCUSE ME. I GRADUATED FROM HAMPDEN SYDNEY COLLEGE IN VIRGINIA IN 1961 WITH A BACHELOR OF SCIENCE DEGREE, A PRE-MED MAJOR. AND THEN I ATTENDED THE UNIVERSITY OF TEXAS LAW SCHOOL IN AUSTIN FROM 1961 TO 1964. I GRADUATED WITH A LAW DEGREE AND WAS LICENSED TO PRACTICE LAW IN TEXAS IN 1964. THEN I ATTENDED THE UNIVERSITY OF TEXAS MEDICAL BRANCH IN GALVESTON FROM 1964 TO 1968, GRADUATED WITH A DOCTOR OF MEDICINE DEGREE IN 1968, AND WAS LICENSED [746] TO PRACTICE MEDICINE IN TEXAS THAT YEAR.

THEN I DID A ROTATING INTERNSHIP AT THE UNIVERSITY OF CINCINNATI, CINCINNATI GENERAL HOSPITAL FROM 1969 – EXCUSE ME, 1968 AND '69. THEN I RETURNED TO GALVESTON AND DID A FULL THREE-YEAR GENERAL PSYCHIATRY RESIDENCY IN THE DEPARTMENT OF PSYCHIATRY AND NEUROLOGY AND COMPLETED THAT IN 1972. IN 1971 AND '72, I WAS CHIEF RESIDENT IN THE DEPARTMENT OF PSYCHIATRY AND NEUROLOGY AT THE MEDICAL BRANCH IN GALVESTON.

ON COMPLETION OF MY PSYCHIATRIC SPECIALTY TRAINING, I THEN BEGAN SERVICE IN THE UNITED STATES ARMY MEDICAL CORP AS A MAJOR AT FORT SAM HOUSTON, TEXAS, FOR TWO YEARS. I RAN THE DRUG AND ALCOHOL PROGRAM THERE. AND I WAS A PSYCHIATRIC CONSULTANT TO BROOKE GENERAL HOSPITAL. UPON COMPLETION

OF MY MILITARY SERVICE IN 1974, I MOVED TO AUSTIN. I'VE BEEN IN PRIVATE GENERAL PSYCHIATRIC PRACTICE THERE SINCE 1974.

I'M BOARD-CERTIFIED IN GENERAL PSYCHIATRY BY THE AMERICAN BOARD OF PSYCHIATRY AND NEUROLOGY AS OF FEBRUARY 1975. MY MEDICAL LICENSE IS ON FILE WITH THE DISTRICT CLERK IN TRAVIS COUNTY, WHERE I PRACTICE.

Q OKAY. ARE YOU CALLED ON OCCASIONALLY TO EVALUATE PEOPLE – DEFENDANTS IN CRIMINAL CASES?

A YES, VERY COMMON.

Q HOW OFTEN IS THAT?

[747] A. WELL, I'VE EXAMINED TWO OR THREE THOUSAND PEOPLE THAT WERE CHARGED WITH FELONIES IN TRAVIS COUNTY, WHERE I LIVE, AND I'VE ALSO DONE SOME EVALUATIONS FOR WILLIAMSON COUNTY, QUITE A NUMBER OF OTHER COUNTIES, TOM GREEN COUNTY OVER THE YEARS. I WOULD SAY THAT ... SOMEWHERE BETWEEN TWO AND THREE THOUSAND PEOPLE.

Q HAVE YOU APPEARED BOTH FOR THE STATE AND THE DEFENSE IN CASES?

A YES.

Q OKAY. DID YOU EXAMINE THE INDIVIDUAL THAT'S – IN THIS CASE, TED CALVIN COLE?

MR. SPENCE: YOUR HONOR, I WOULD LIKE TO TAKE THE WITNESS ON VOIR DIRE AT THIS TIME.

THE COURT: FOR WHAT PURPOSE?

MR. SPENCE: FOR WHAT PURPOSE? TO DETERMINE WHETHER OR NOT THERE WERE ANY MIRANDA WARNINGS GIVEN.

THE COURT: I NOTE HERE IN THE FILE THAT ON MARCH THE 1ST, I HAVE A LETTER JUDGE HART HAD ORDERED, AS JUDGE OF THE 51ST JUDICIAL DISTRICT, THAT PURSUANT TO AN ORDER SIGNED BY JUDGE HART ON FEBRUARY 9TH, 1988, A PSYCHOLOGICAL EXAMINATION WAS PERFORMED BY MR. COONS. NOW, IN WHAT – CAN YOU GIVE ME WHAT STATUTE OR WHAT – WHAT PORTION OF THE LAW YOU'RE TALKING IN REFERENCE TO? THE COURT'S ORDERED THE PSYCHIATRIC EXAMINATION. THERE [748] ARE NO MIRANDA WARNINGS REQUIRED.

MR. SPENCE: WELL, YOUR HONOR, THERE'S A NEW SUPREME COURT CASE WHICH CAME OUT THIS WEEK –

THE COURT: EXCUSE ME.

HAVE THE JURY PLEASE STEP OUTSIDE.

[THEREUPON, THE JURY WAS RETIRED FROM THE COURTROOM, AND THE FOLLOWING PROCEEDINGS WERE HAD OUTSIDE THE PRESENCE AND HEARING OF THE JURY, TO-WIT:]

THE COURT: DO YOU HAVE SOMETHING YOU WANT TO GIVE THEM?

THE WITNESS: NO, SIR, IT'S JUST A COPY OF THE ORDER.

THE COURT: ALL RIGHT. CITE ME WHAT YOU WANT TO CITE. THE JURY – LET THE RECORD REFLECT THE JURY HAS BEEN EXCUSED.

WHAT DO YOU WANT TO CITE ME?

MR. SPENCE: THE SATTERWHITE CASE, WHICH CAME OUT EARLIER THIS WEEK, I BELIEVE. I HAVE NOT SEEN A COPY OF THE CASE. ALL I KNOW IS WHAT I'VE BEEN TOLD, WHICH IF THE MIRANDA WARNINGS HAVE NOT BEEN GIVEN TO THE DEFENDANT, THEN BASICALLY THE COMPETENCY AND ANYTHING THAT HAS BEEN TESTED BY THE DOCTOR IS NOT GOING TO BE ADMISSIBLE.

[749] <OUTSIDE PRESENCE AND HEARING OF THE JURY>

THE COURT: OKAY.

MR. ALCALA: YOUR HONOR, WE INTEND TO – WE ANTICIPATE THE EVIDENCE TO SHOW THAT INDEED THE WARNINGS WERE GIVEN. NEVERTHELESS, THOUGH, IT WOULD BE MOOT. WE HAVEN'T GOT TO THAT POINT TO ASKING THE DOCTOR WHETHER HE DID OR NOT, AND IT'S NOT –

THE COURT: IT'S NOT AT ISSUE YET.

HAS ANYBODY SEEN THE SATTERWHITE CASE?

MR. ALCALA: NO.

THE COURT: ARE Y'ALL AWARE OF IT?

MR. SMITH: YES, YOUR HONOR.

MR. FOHN: ALSO, ESTELLE VERSUS – SMITH VERSUS ESTELLE, WHICH DOES SPEAK IN TERMS OF WARNINGS –

THE COURT: I UNDERSTAND THAT.

MR. FOHN: – IN THE OLD CASES.

THE COURT: WHAT ARE YOU – WELL, WHAT I'M ASKING ABOUT IS – I UNDERSTAND THE WARNINGS. THERE'S SOME FORM OF WARNINGS NEED TO BE GIVEN OR EXPLAINED.

MR. FOHN: YES, SIR.

THE COURT: MY QUESTION IS: ARE YOU SAYING THAT THAT CASE SAYS THEY HAVE TO BE IN WRITING AND HE HAS TO SIGN OFF ON THOSE, OR WHAT ARE YOU SAYING?

MR. SPENCE: WHAT I'M SAYING IS, YOUR HONOR, [750] THAT WARNINGS HAVE TO BE GIVEN. NOW, AS TO ANY PARTICULAR FORM OR FASHION, I'M NOT AWARE OF THAT.

THE COURT: ALL RIGHT. THAT'S ALL I WANTED TO KNOW. I DON'T THINK WE'RE TO THAT POINT TO TAKE THE – TO TAKE THE WITNESS ON VOIR DIRE. I WILL ALLOW YOU TO TAKE THE WITNESS ON VOIR DIRE ONCE, IF – BEFORE HE TENDERS HIS DIAGNOSIS OR PRESENTS ANY WRITTEN REPORTS, I WOULD ALLOW YOU TO TAKE THE WITNESS ON VOIR DIRE. I WOULD ASSUME THAT THE STATE IS GOING TO GO THROUGH WHAT THEY DID AND HOW THEY CAME TO THAT POINT OF THE EXAMINATION AND WHAT THEY OBSERVED BASED UPON THAT. AND WHEN YOU GET TO THAT POINT, I

THINK IT WOULD BE A PROPER TIME TO MAKE THE OBJECTION.

NOW, IF YOU DISAGREE WITH ME, IF YOU DESIRE TO STILL TAKE THE WITNESS ON VOIR DIRE AT THIS MOMENT, I WILL CERTAINLY ALLOW THAT. I THINK – I THINK IT'S NOT THE PROPER TIME FOR THE OBJECTION; BUT IF YOU WANT TO TAKE THE WITNESS ON VOIR DIRE, I'M GOING TO GIVE YOU AS MUCH FLEXIBILITY AS POSSIBLE, MR. SPENCE.

MR. SPENCE: THANK YOU, YOUR HONOR.

THE COURT: DO YOU WANT TO TAKE THE WITNESS ON VOIR DIRE AT THIS TIME, OR DO YOU WANT TO WAIT UNTIL THE MATTER BECOMES AN ISSUE?

MR. SPENCE: I'D LIKE TO DO IT AT THIS TIME, [751] YOUR HONOR.

THE COURT: ALL RIGHT. PROCEED.

VOIR DIRE EXAMINATION

BY MR. SPENCE:

Q DR. COONS, WHEN WAS THE FIRST TIME THAT YOU SAW TED COLE?

A ON FEBRUARY 19TH, 1987.

Q FEBRUARY THE 19TH?

A YES, SIR.

Q IS THAT THE ONLY TIME THAT YOU'VE SEEN HIM?

A YES.

Q AT THAT TIME WHEN HE CAME TO – I SUPPOSE THAT HE CAME TO YOUR OFFICE IN AUSTIN.

THE COURT: EXCUSE ME. I ASSUME YOU WANT THIS VOIR DIRE PROCESS TAKEN OUTSIDE THE PRESENCE OF THE JURY?

MR. SPENCE: YES, YOUR HONOR.

THE COURT: PURSUANT TO YOUR REQUEST, THE JURY IS STILL OUT OF THE BOX, AND YOU MAY CONTINUE.

BY MR. SPENCE:

Q HE WAS TAKEN TO YOUR OFFICE THERE IN AUSTIN?

A HE WAS TAKEN TO THE OFFICE OF DR. GEORGE PARKER, WHERE –

[752] Q DR. GEORGE PARKER.

A – HE WAS EXAMINED.

Q AND YOU SAW HIM IN DR. GEORGE PARKER'S OFFICE?

A YES.

Q NOW, AT THE TIME THAT YOU TALKED TO MR. COLE AND DID AN EVALUATION AS TO HIS COMPETENCY TO STAND TRIAL, WERE ANY MIRANDA WARNINGS – FIFTH AMENDMENT WARNINGS GIVEN TO HIM AT THAT TIME?

A YES.

Q WERE THEY GIVEN IN WRITING, SIR?

A NO.

Q THEY WERE ORALLY GIVEN?

A YES.

MR. SPENCE: I HAVE NO FURTHER QUESTIONS YOUR HONOR.

THE COURT: ALL RIGHT. ANYTHING ELSE?

ALL RIGHT, LET'S BRING THE JURY BACK IN.

DO YOU HAVE ANY OBJECTION TO MAKE OUTSIDE OF THE PRESENCE OF THE JURY AT THIS TIME?

MR. SPENCE: SIR?

THE COURT: DO YOU HAVE ANY OBJECTION TO MAKE OUTSIDE THE PRESENCE OF THE JURY AT THIS TIME?

[753] MR. SPENCE: NO, YOUR HONOR.

THE COURT: IT WOULDN'T BE TIMELY, BUT IF YOU WANT TO MAKE THEM, YOU MAY.

BRING THE JURY BACK IN.

DIRECT EXAMINATION [RESUMED]

BY MR. SMITH:

Q DR. COONS, WHAT ADDITIONAL WARNINGS DID YOU GIVE?

A [NO RESPONSE]

THE COURT: NO, NO, NO, NO, NO, NO.

THAT'S FINE. I'VE RULED ON HIS – I'VE RULED – HE'S TAKEN HIM ON VOIR DIRE. HE HASN'T MADE AN OBJECTION; SO WE DON'T GO THAT WAY. WE BRING THEM BACK IN, AND YOU CAN START ASKING IN FRONT OF THE JURY.

MR. SMITH: OKAY.

[THEREUPON, THE JURY WAS RETURNED TO THE COURTROOM, AND THE FOLLOWING PROCEEDINGS WERE HAD WITHIN THE PRESENCE AND HEARING OF THE JURY, TO-WIT:]

THE COURT: BE SEATED.

[754] LET'S PROCEED. THE RECORD WILL REFLECT THAT ALL PARTIES ARE PRESENT. THE JURY IS IN THE BOX.

YOU MAY PROCEED, MR. SMITH.

MR. SMITH: THANK YOU, YOUR HONOR.

DIRECT EXAMINATION [RESUMED]

BY MR. SMITH:

Q I BELIEVE I WAS ASKING THE QUESTION "DID YOU EXAMINE THE INDIVIDUAL IN THIS CASE, TED CALVIN COLE?"

A YES.

Q UNDER WHAT CIRCUMSTANCES DID YOU CONDUCT THE EXAMINATION?

A UNDER A COURT ORDER. HE WAS BROUGHT TO AUSTIN, TEXAS, TO THE OFFICE OF DR. GEORGE

PARKER Ph.D., CLINICAL PSYCHOLOGIST WHO PARTICIPATED IN A PORTION OF THE EXAMINATION BY PERFORMING SOME PSYCHOLOGICAL TESTING.

Q AND WHAT WAS THE DATE OF THIS EXAMINATION?

A ON FEBRUARY 19TH, 1987.

Q DID YOU GIVE THE DEFENDANT ANY WARNINGS?

A YES.

Q WHAT WARNINGS DID YOU GIVE HIM?

A WELL, ESSENTIALLY, WE DISCUSSED WHY THE EXAMINATION WAS BEING DONE, THAT HE DID NOT HAVE TO PARTICIPATE IN IT AND SO FORTH, AND THAT HE – THAT IT WAS PURSUANT TO A COURT-ORDERED EXAMINATION; NONE OF THE COMMUNICATIONS WOULD BE PRIVILEGED; A COPY OF THE REPORT WILL BE AVAILABLE TO THE [755] COURT, THE DISTRICT ATTORNEY, AND THE DEFENSE ATTORNEY, AND THAT I MAY BE REQUIRED TO TESTIFY IN COURT REGARDING ALL COMMUNICATIONS WHICH OCCURRED – CURED – OCCURRED DURING THE EXAMINATION AND INTERVIEW.

Q DID YOU GIVE HIM HIS MIRANDA RIGHTS AS WELL?

A YES. I MEAN, WE DISCUSSED THAT AS WELL.

Q AND DID HE SEEM TO UNDERSTAND?

A OH, YES. WE DISCUSSED IT. AND LATER IN THE EXAMINATION I ALSO WENT OVER THE – SOME OTHER WARNINGS . . . I MEAN, REITERATED THE WARNINGS.

Q COULD YOU READ SPECIFICALLY THE WARNINGS THAT YOU GAVE HIM INTO THE RECORD, PLEASE?

A COULD I READ THE WARNINGS THAT I GAVE HIM?

Q YES.

A THAT HE HAS THE RIGHT TO HAVE HIS LAWYER PRESENT TO ADVISE HIM; THAT IF HE WAS UNABLE – WELL, I DIDN'T GO INTO UNABLE TO EMPLOY A LAWYER, THAT HE HAD A RIGHT TO – BECAUSE WE DISCUSSED THAT HE ALREADY DID HAVE A LAWYER AND HE HAD DISCUSSED IT WITH HIS LAWYER.

YOU [SIC] HAVE THE RIGHT TO REMAIN SILENT, NOT MAKE ANY STATEMENT, AND THAT ANY STATEMENT THAT HE SO MADE COULD BE USED IN EVIDENCE AGAINST HIM. WHAT I INDICATED TO HIM WAS THAT THE STATEMENTS THAT HE MADE TO ME WOULD NOT BE USED TO PROVE HIM GUILTY IN THE TRIAL, THAT THEY WERE MADE FOR THE PURPOSE OF OPINIONS ABOUT HIS COMPETENCY [756] AND SANITY.

THEN WE WENT TO THE ISSUE OF THE PUNISHMENT PHASE OF THE TRIAL. AND I TOLD HIM THAT HE COULD TERMINATE THE INTERVIEW. I ALSO READ THE – WHAT I HAD JUST STATED FROM THE ORDER.

Q WHEN YOU SPOKE OF THE PUNISHMENT PHASE, WHAT SPECIFIC WARNINGS DID YOU TALK – GIVE TO HIM ABOUT THE PUNISHMENT PHASE?

A THAT I COULD BE A WITNESS AT THE PUNISHMENT PHASE OF HIS TRIAL. WE DISCUSSED THE ISSUE ABOUT WHETHER – THAT THE JURY WOULD BE ASKED TO DECIDE WHETHER A DEFENDANT – WHETHER THERE WAS A PROBABILITY THAT THE DEFENDANT WOULD COMMIT CRIMINAL ACTS OF VIOLENCE IN THE FUTURE WHICH WOULD CONSTITUTE A CONTINUING THREAT TO SOCIETY AND THAT THAT – THAT I MIGHT WELL BE CALLED AS A WITNESS IN THAT REGARD AND THAT DR. PARKER MIGHT BE CALLED AS A WITNESS IN THAT REGARD.

Q WHAT TESTS WERE CONDUCTED?

A HE WAS ADMINISTERED A MINNESOTA MULTIPHASIC PERSONALITY INVENTORY, WHICH IS THE M.M.P.I.; RORSCHACH INKBLOT TEST, ROTOR INCOMPLETE SENTENCES; AND PSYCHOLOGICAL ASSESSMENT INTERVIEW AND A PSYCHOLOGICAL STATUS INVENTORY.

Q WHO CONDUCTED THOSE TESTS?

A DR. GEORGE PARKER.

Q DID YOU CONSULT WITH HIM?

[757] A. YES.

Q DOES CONSULTATION WITH HIM AND THE RESULTS OF THE TESTS FORM A BASIS OF YOUR OPINION?

A IT'S A PORTION OF MY OPINION, YES. I'VE TAKEN THAT INTO CONSIDERATION.

Q OKAY. WHAT IS YOUR PROFESSIONAL RELATIONSHIP WITH DR. PARKER?

A DR. PARKER IS AN INDEPENDENT PRACTITIONER OF PSYCHOLOGY, WHO AT TIMES I HAVE REFERRED PATIENTS TO REGARDING PSYCHOLOGICAL TESTING, AND HE DOES MOST OF THE CRIMINAL FORENSIC PSYCHOLOGY IN THE AUSTIN AREA. HE'S A FORMER PROFESSOR AT THE UNIVERSITY OF TEXAS FOR ELEVEN YEARS IN PSYCHOLOGICAL TESTING. AND I UTILIZE HIS SERVICES AT TIMES OR THE DISTRICT ATTORNEY'S OFFICE OR PRIVATE LAWYERS WILL ASK HIM TO PERFORM PSYCHOLOGICAL TESTING IN CRIMINAL OR CIVIL MATTERS. WE DON'T OFFICE TOGETHER. WE'RE NOT FINANCIALLY INVOLVED IN ANY WAY.

Q OKAY. DID YOU FORM AN OPINION AS TO WHAT TYPE OF PERSONALITY TED CALVIN COLE HAS?

A YES.

Q AND WHAT WAS THAT PERSONALITY – OPINION?

A HE HAS A NUMBER OF SOCIOPATHIC FEATURES.

MR. SPENCE: YOUR HONOR, I'M GOING TO OBJECT TO THIS ON THE – ON THE GROUNDS THAT WHATEVER OPINIONS HE – [758] HE FORMED OUT OF THIS COULD NOT BE BASED ON THE TESTS THAT HE GIVES, THAT THE TIME THAT HE SPENT

WITH HIM IN AUSTIN WAS INSUFFICIENT FOR THIS OPINION.

THE COURT: THAT GOES TO THE WEIGHT OF THE EVIDENCE, NOT THE ADMISSIBILITY.

YOU MAY CONTINUE.

BY MR. SMITH:

Q COULD YOU REPEAT YOUR ANSWER, PLEASE?

A YES. MR. COLE HAS A NUMBER OF SOCIOPATHIC ANTISOCIAL PERSONALITY FEATURES TO HIS PERSONALITY.

Q WAS THAT INDICATED IN YOUR INTERVIEW WITH MR. COLE? COLE?

A YES. WELL, IN THE INTERVIEW, IN THE PSYCHOLOGICAL TESTING, AND IN THE HISTORY OF – THAT I HAD AS WELL ABOUT HIS PRIOR HISTORY.

Q OKAY. HOW WAS IT INDICATED TO YOU IN YOUR INTERVIEW WITH THE INDIVIDUAL?

A WELL, THE HISTORY OF – THAT HE GAVE ME ABOUT HIS DELIBERATION ABOUT THIS OFFENSE THAT HE WAS DOING, THIS WILLINGNESS TO TAKE THE LIFE OF ANOTHER PERSON FOR FINANCIAL GAIN; THE – HIS PRIOR CRIMINAL HISTORY, WHICH – WHICH HE DESCRIBED TO ME; HIS – HIS FEELINGS AND ATTITUDE ABOUT HAVING COMMITTED THIS OFFENSE, IN TERMS OF INDICATING THAT IT DID NOT BOTHER HIM THAT HE HAD KILLED THIS OLDER MAN [759] AND HIS

RATIONALE FOR WHY IT DIDN'T BOTHER HIM, THAT HE WAS OLD AND ALL HE DID WAS SIT AROUND THE HOUSE AND DRINK VODKA, AND HALF THE TIME HE DIDN'T KNOW WHERE HE WAS; AND THE ONLY THING ABOUT THIS THAT BOTHERS ME IS GETTING CAUGHT. THOSE ARE FEATURES OF A PERSON WITH – WHO HAS SERIOUS CONSCIENCE DEFECTS WHICH YOU SEE IN SOCIOPATHIC OR ANTISOCIAL PERSONALITIES, THE LACK OF REMORSE FOR THINGS, THE LACK OF CONSCIENCE ABOUT THEM.

Q HOW WAS HIS LACK OF REMORSE INDICATED?

A WELL, I MEAN, "HOW DO YOU FEEL ABOUT KILLING THE OLD MAN?" "WELL, IT DOESN'T REALLY BOTHER ME." AND HE DIDN'T LOOK LIKE IT BOTHERED HIM, AND HE DIDN'T TALK LIKE IT BOTHERED HIM, AND I DON'T BELIEVE IT BOTHERED HIM.

Q DID HE INDICATE ANYTHING – THAT HE REGRETTED ANYTHING ABOUT THIS?

A I'M SORRY?

Q DID HE INDICATE THAT HE REGRETTED ANYTHING CONCERNING THIS?

A WELL, ON THE PSYCHOLOGICAL TESTING, ONE OF THE TESTS THAT'S GIVEN IS CALLED A "ROTOR INCOMPLETE SENTENCES," AND THESE ARE – IT'S A PROJECTIVE TEST WHERE A NUMBER OF INCOMPLETE SENTENCES ARE GIVEN, AND THE PERSON WHO IS TAKING THE TEST THEN FILLS OUT WHAT THEIR RESPONSE IS. AND IT WOULD BE

THINGS LIKE, "I LIKE" AND BLANK, AND THE PERSON TAKING THE TEST FILLS IN THE BLANK. "I LIKE ICE [760] CREAM" OR "MOTHER" OR "POWER" OR WHATEVER. AND THERE'S QUITE A NUMBER OF QUESTIONS. AND ONE THAT STUCK OUT WAS THAT – IT BEGINS, "I REGRET . . . " AND MR. COLE'S RESPONSE TO THAT WAS "NOTHING," EXCLAMATION POINT. AND THAT'S THE KIND OF THING THAT YOU WOULD EXPECT TO SEE IN SOMEONE WHO REGRETS NOTHING.

MR. SMITH: YOUR HONOR, MAY I APPROACH THE COURT REPORTER'S DESK HERE?

THE COURT: YOU MAY APPROACH.

BY MR. SMITH:

Q DR. COONS, I WANT TO GIVE YOU SORT OF A HYPOTHETICAL HERE. WHAT WOULD YOU THINK OF A THIRTY-YEAR-OLD MALE WHO WOULD WRITE IN A – SAY IN A DIARY OR EXPRESS THESE IDEAS, AS TO WHETHER HE WOULD FIT INTO AN ANTISOCIAL CATEGORY AS FAR AS PERSONALITY – SOCIOPATHIC PERSONALITY, MINDING THAT THIS IS A THIRTY-YEAR-OLD-MALE, "MET SOME CUTE TWELVE-YEAR-OLD NAMED 'CODY.' GOT TO HAVE HIM SOONER OR LATER. T.J. KNOWS A BUNCH OF THEM. THEY'RE ALL JAIL BAIT," AND THEN FURTHER, "I NEED SOME EXCITEMENT SO I CAN FEEL THAT I AM ALIVE ONCE IN AWHILE. WANT TO FIND SOMEONE WHO IS YOUNG, ATTRACTIVE AND WITH A SENSE OF ADVENTURE, WITH WHOM I CAN ROAM AROUND THE WORLD, SAILING IN THE SOUTH PACIFIC, THE CARIBBEAN, EXPLORING THE MEDITERRANEAN, PARTYING SOME-[761]WHERE IN THE

SOUTH AMERICAN JUNGLES, SMUGGLING, STEALING, ROBBING, RAPING, PILLAGING, MODERN-DAY VIKINGS OR PIRATES."

DR. COONS, HOW WOULD EACH ONE OF THOSE TWO PASSAGES I READ TO YOU FIT INTO THAT TYPE OF BEHAVIOR THAT YOU'VE BEEN TALKING ABOUT?

MR. SPENCE: YOUR HONOR, I DON'T BELIEVE THAT'S THE PROPER PREDICATE FOR A HYPOTHETICAL QUESTION. I WOULD OBJECT TO THAT.

THE COURT: I DON'T THINK HE PLACED A HYPOTHETICAL QUESTION, MR. SPENCE. DO YOU WANT TO RESTATE YOUR OBJECTION?

MR. SPENCE: I HAVE NO OBJECTION, YOUR HONOR.

THE COURT: YOU WITHDRAW YOUR OBJECTION?

MR. SPENCE: WITHDRAW THE OBJECTION.

THE COURT: YOU MAY PROCEED.

THE WITNESS: THOSE – THOSE TWO CONCEPTS – WELL, LET'S TAKE THE FIRST. THIS IS – I PRESUME CODY IS A MALE, AND THIS IS A DESIRE FOR HOMOSEXUAL PEDOPHILIA, SEXUAL INTERACTION WITH CHILDREN OF THE SAME SEX . . . AND A KNOWLEDGE THAT IT'S WRONG, JAIL BAIT, BUT A DESIRE TO DO IT ANYWAY. THAT'S THE FANTASY LIFE OF THE INDIVIDUAL WHO WRITES THAT.

AS REGARDS THE SECOND, "I NEED EXCITEMENT TO FEEL ALIVE. I NEED SOME ACTION," WELL, WHAT'S THE ACTION? [762] I MEAN, IS IT SKIING IN COLORADO, OR IS IT SMUGGLING, STEALING, ROBBING, RAPING, ETCETERA, MODERN-DAY VIKING? WELL IT'S THAT – TO MY WAY OF THINKING, THE FANTASY LIFE OF A SOCIOPATH, THE FANTASY LIFE OF A PERSON WHOSE GOT THAT ON HIS MIND.

Q OKAY. IS THIS OPINION BASED ON YOUR EXPERIENCE AND – TRAINING AND EXPERIENCE AS A PSYCHIATRIST?

A YES, AND PARTICULAR AS REGARDS TO THE CRIMINAL FORENSIC WORK WITH THE CRIMINAL JUSTICE SYSTEM AND FOURTEEN YEARS' WORTH OF ACTUAL EXPERIENCE DOING THAT . . . THOUSANDS OF PEOPLE. YES, THAT'S MY OPINION. AND THAT'S BASED ON THAT EXPERIENCE.

MR. SMITH: PASS THE WITNESS, YOUR HONOR.

MR. SPENCE: YOUR HONOR, AT THIS TIME BEFORE CROSS-EXAMINING DR. COONS, MAY WE BREAK FOR LUNCH?

THE COURT: APPROACH THE BENCH.

[THEREUPON, COUNSEL APPROACHED THE BENCH, AND A DISCUSSION WAS HAD OFF THE RECORD.]

THE COURT: LADIES AND GENTLEMEN OF THE JURY, WHETHER THE FOOD IS HERE OR NOT, WE'RE GOING TO TAKE A BRIEF RECESS PRIOR TO THE CROSS EXAMINATION. AND IF THE FOOD

COMES IN TIME, THEN WE'LL – WE'LL BRING IT IN TO YOU [763] AND EAT. IF IT DOESN'T COME IN TIME, THEN WE'LL GET STARTED BACK AGAIN IN A FEW MINUTES AND PROCEED ON UNTIL THERE'S A GOOD BREAK TIME. THAT'S WHY IT'S A BOX LUNCH. IT WON'T MATTER IF IT'S HOT OR NOT. THANK YOU VERY MUCH.

[RECESS]

[THEREAFTER, THE FOLLOWING PROCEEDINGS WERE HAD WITHIN THE PRESENCE AND HEARING OF ALL PARTIES BUT OUTSIDE THE PRESENCE AND HEARING OF THE JURY, TO-WIT:]

THE COURT: DO YOU WANT AN OPPORTUNITY TO TALK TO MR. COONS OR SOMEONE ELSE?

MR. SPENCE: SOMEONE ELSE, YOUR HONOR.

THE COURT: THAT'S FINE. I'M GOING TO GIVE YOU ABOUT TEN OR FIFTEEN, TWENTY MINUTES.

MR. SPENCE: THANK YOU.

THE COURT: I'M GOING TO SAY, "FIFTEEN MINUTES," BUT I'LL GIVE YOU MORE IF YOU NEED.

YOU CAN PUT MR. COLE BACK OVER HERE.

[RECESS]

[THEREAFTER, THE FOLLOWING PROCEEDINGS [764] WERE HAD WITHIN THE PRESENCE AND HEARING OF ALL PARTIES BUT OUTSIDE THE PRESENCE AND HEARING OF THE JURY, TO-WIT:]

THE COURT: Y'ALL READY TO PROCEED?

MR. SPENCE: YES, YOUR HONOR.

THE COURT: WE'RE ON THE RECORD OUTSIDE THE PRESENCE OF THE JURY. ALL PARTIES ARE PRESENT.

BRING THE JURY IN, PLEASE.

[THEREUPON, THE JURY WAS RETURNED TO THE COURTROOM, AND THE FOLLOWING PROCEEDINGS WERE HAD WITHIN THE PRESENCE AND HEARING OF THE JURY, TO-WIT:]

THE COURT: BE SEATED.

ALL RIGHT. LET THE RECORD REFLECT THAT ALL PARTIES ARE PRESENT. THE JURY IS IN THE BOX. THE STATE HAD COMPLETED DIRECT EXAMINATION OF DR. COONS, AND I BELIEVE THE DEFENDANT HAS HIM ON CROSS. YOU MAY PROCEED.

MR. SPENCE: THANK YOU, YOUR HONOR.

CROSS-EXAMINATION

BY MR. SPENCE:

Q DR. COONS, NOW, YOU SAW TED BACK IN FEBRUARY?

[765] A YES.

Q HOW MUCH TIME DID YOU SPEND WITH HIM?

A SOMETHING OVER TWO HOURS.

Q TWO HOURS?

A NO. SOMETHING OVER TWO HOURS.

Q OVER TWO HOURS. HOW MANY TIMES HAVE YOU SEEN HIM?

A ONE TIME.

Q AND I THINK YOU TESTIFIED AWHILE AGO THAT HE WAS GIVEN A BATTERY OF TESTS?

A YES. IN ADDITION TO THAT, HE WAS.

Q AND WHO WAS THE PERSON THAT GAVE THE TESTS?

A GEORGE PARKER, Ph.D., A CLINICAL PSYCHOLOGIST IN AUSTIN.

Q A PSYCHOLOGIST? IS IT COMMON FOR A PSYCHIATRIST TO RELY ON A PSYCHOLOGIST'S TEST IN HIS WORK-UP?

A YES. IT'S NOT ALWAYS DONE, BY ANY MEANS; BUT IT'S CERTAINLY, AT TIMES, A HELPFUL ADJUNCT.

Q AND I THINK YOU MENTIONED AWHILE AGO THAT TED WAS A SOCIOPATH.

A HE HAS ANTISOCIAL, SOCIOPATHIC, PSYCHOPATHIC – THEY ALL MEAN THE SAME – ESSENTIALLY THE SAME THING – FEATURES TO HIS PERSONALITY, YES.

Q DOES – A "SOCIOPATH," DOES THAT MEAN ONE THING, OR DOES IT MEAN VARIOUS THINGS?

A WELL, IN TERMS OF THE FEATURES THAT I DESCRIBED, THOSE ARE THE – I WAS ASKED WHAT

ARE THE FEATURES THAT I SAW IN HIM [766] THAT INDICATE TO ME THAT HE HAS THOSE FEATURES . . .

MR. SPENCE: I HAVE NO –

THE WITNESS: . . . THAT THOSE –

MR. SPENCE: – FURTHER QUESTIONS, YOUR HONOR.

THE COURT: ANYTHING ELSE?

REDIRECT EXAMINATION

BY MR. SMITH:

Q DR. COONS, WOULD YOU DEFINE "SOCIOPATH"?

A WELL, IT BEGAN WITH THE TERM "PSYCHOPATH." THEN WE MOVED TO "SOCIOPATH" OR "SOCIOPATHIC PERSONALITY." THEN WE MOVED TO "ANTISOCIAL PERSONALITY DISORDER." AND THESE ARE A PERSONALITY TYPE. LIKE, AN EXCESSIVE, COMPULSIVE PERSONALITY IS ONE WHO HAS EVERYTHING ORDERLY AND NEAT AND TO A – TO AN EXCESS.

AND THEN YOU CAN HAVE PEOPLE WHO ARE DEPENDENT PERSONALITIES, WHO ARE DEPENDENT ON OTHER PEOPLE FOR THEIR EMOTIONAL WELL-BEING. YOU CAN HAVE . . . WELL, DIFFERENT TYPE PERSONALITY DISORDERS. SOCIOPATHIC OR PSYCHOPATHIC OR ANTISOCIAL PERSONALITY IS A TYPE OF DISORDER. WHAT IT MEANS IS PERSONALITY PATTERNS OVER THE YEARS THAT HAVE CERTAIN FEATURES.

AND I DIDN'T BRING MY DSM-III-R WITH ME, WHICH IS THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, [767] THIRD EDITION, REVISED AS OF, I BELIEVE, 1987. BUT IT HAS A NUMBER OF FEATURES. IF YOU'RE GOING TO MAKE THE FIRM DIAGNOSIS OF ANTISOCIAL PERSONALITY DISORDER, THEN – THEN YOU FULFILL THOSE PARTICULAR CRITERIA THAT ARE LISTED IN DSM-III-R.

Q WHAT ARE SOME OF THOSE CRITERIA?

A OH, GOSH. OH, LET'S THINK HERE.

THEY TALK ABOUT THEM BEFORE THE AGE OF FIFTEEN THAT THEY HAVE TRUANCY, THEY HAVE CERTAIN PROBLEMS THAT – I MEAN, I – I DON'T RECALL ALL OF THEM, BUT THEY LIST CERTAIN THINGS THAT OCCUR BEFORE FIFTEEN; THEY LIST CERTAIN THINGS THAT OCCUR AFTER FIFTEEN . . . BASICALLY, SEXUAL INFIDELITY, THINGS OF THAT NATURE . . . INJURY TO OTHER PERSONS, ETCETERA.

KIND OF THE CLASS THINKING ABOUT THE SOCIOPATHIC PERSONALITY IS THE – IS THAT THEY HAVE – THAT THEY DO ACTS AGAINST SOCIETY AND THAT THEY DON'T PROFIT FROM THEIR EXPERIENCES. THEY DON'T LEARN FROM EXPERIENCE. THEY JUST KEEP ON DOING THESE THINGS BECAUSE THEY WANT TO. THEY DON'T FEEL REMORSEFUL OR GUILTY ABOUT WHAT THEY'VE DONE. IT'S A – IT'S A PERSONALITY PATTERN, AS OPPOSED TO JUST A SHORT-TERM PROBLEM. IT'S A FEATURE OF THEIR PERSONALITY.

MR. SMITH: PASS THE WITNESS, YOUR HONOR.

THE COURT: ANYTHING ELSE?

[768] MR. SPENCE: I HAVE NO FURTHER QUESTIONS, YOUR HONOR.

THE COURT: STEP DOWN.

MAY THIS WITNESS BE EXCUSED, OR DO YOU INTEND TO CALL HIM AT A LATER TIME?

MR. FOHN: ASK HIM TO REMAIN FOR A LITTLE WHILE, YOUR HONOR.

THE COURT: ALL RIGHT. DR. COONS, JUST STEP OUTSIDE.

CALL YOUR NEXT WITNESS.

<STATE RESTS>

MR. SMITH: YOUR HONOR THE STATE WOULD REST AT THIS TIME.

* * *

THE COURT: DEFENDANT . . . ?

MR. SPENCE: DEFENDANT'S READY, YOUR HONOR.

THE COURT: WOULD YOU LIKE TO MAKE AN OPENING STATEMENT?

MR. SPENCE: NO, YOUR HONOR. WE'D WAIVE OPENING STATEMENT.

THE COURT: THE RECORD WOULD REFLECT THAT THE DEFENDANT HAS WAIVED AN OPENING STATEMENT.

* * *

[769] NANCY DORIS HICKEY

WAS CALLED AS A WITNESS ON BEHALF OF THE DEFENDANT AND, HAVING BEEN FIRST DULY SWORN, TESTIFIED AS FOLLOWS, TO-WIT:

DIRECT EXAMINATION

BY MR. SPENCE:

Q MS. HICKEY, WOULD YOU STATE YOUR NAME FOR THE RECORD, PLEASE?

[770] A "NANCY DORIS HICKEY."

Q MS. HICKEY, ARE YOU THE MOTHER OF TED CALVIN COLE?

A I AM.

Q WHEN WAS TED BORN?

A 1956, GOODFELLOW AIR FORCE BASE, SAN ANGELO, TEXAS.

Q IN 1956?

WHO – WHO IS TED'S FATHER?

A CHARLES CALVIN COLE.

WHERE IS MR. COLE AT THE PRESENT TIME?

A I HEARD FROM MY DAUGHTER THAT HE WAS IN RED BLUFF, A SUBURBS [SIC] OF DALLAS.

Q NOW, AT THE TIME OF TED'S BIRTH, WERE YOU AND MR. COLE LIVING TOGETHER? WERE Y'ALL MARRIED –

A YES.

Q – AT THAT TIME?

A YES.

Q WAS TED'S FATHER – WAS HE EVER CHARGED WITH ANY TYPE OF CRIMINAL OFFENSES OR CONVICTED OF ANY CRIMINAL OFFENSES?

A YES. WHEN WE LIVED IN SACRAMENTO, HE – HE WASN'T CONVICTED. HE WAS – HE TRIED TO ROB A LIQUOR STORE WHERE WE'D BEEN BUYING LIQUOR FOR THREE YEARS; WENT IN THERE WITH HIS FATIGUES ON WITH HIS NAME TAG ON IT.

Q AND WHERE WAS THIS AT?

A SACRAMENTO.

THAT'S WHEN THE AIR FORCE DECIDED THAT IF HE WANTED [771] OUT, THEY'D LET HIM OUT AND GAVE HIM A GENERAL DISCHARGE.

Q HOW LONG DID YOU AND MR. COLE LIVE TOGETHER?

A OFF AND ON, FOR TEN YEARS.

Q FOR TEN YEARS. NOW, WHEN TED WAS AROUND THE AGE OF FIVE OR SIX, DID HE CONTINUE TO LIVE WITH YOU AT THAT TIME?

A NO. MY HUSBAND HAD DESERTED US SEVERAL TIMES. AND WHEN TED WAS FIVE, I HAD NO

IDEA WHERE HIS FATHER WAS. AND I WAS WORKING IN A BEER JOINT FOR THREE DOLLARS A DAY AND HAD TWO KIDS TO FEED. AND IT WAS TIME FOR TED TO START TO SCHOOL, AND I KNEW I COULDN'T HANDLE IT. SO I CALLED MY BROTHER IN OKLAHOMA, AND HE CAME AND GOT ME AND THE KIDS AND TOOK ME TO MY PARENTS.

Q YOUR PARENTS LIVE IN OKLAHOMA?

A YES. THEY LIVED TOGETHER AT THAT TIME. THEY WERE BOTH ALCOHOLICS. THEY DIDN'T WANT US THERE EITHER, BUT THEY . . . YOU KNOW, WHAT COULD THEY DO? THEY LIVED IN COMPANY HOUSING AREA ABOUT EIGHT MILES OUT OF TOWN. TED WAS THE ONLY CHILD OUT THERE. THE SCHOOL BUSES DIDN'T RUN. AND MY FATHER INFORMED ME IN NO UNCERTAIN TERMS I WOULD NOT USE HIS CAR TO TAKE THAT KID TO SCHOOL AND BACK, TO DO SOMETHING ELSE.

Q AFTER YOU TOOK TED AND HIS BROTHER TO OKLAHOMA –

A TED AND HIS SISTER.

Q TED AND HIS SISTER – DID YOU PLACE THEM IN A HOME UP THERE?

[772] A YES.

Q BOTH OF THEM?

A NO, JUST MY SON.

Q JUST TED?

A I KEPT THE BABY GIRL WITH ME.

Q WHAT – WAS IT AN ORPHANS' HOME, OR WHAT TYPE OF PLACE WAS IT?

A IT'S A CHURCH OF CHRIST CHILDREN'S HOME. YOU HAVE TO GO THROUGH THE DEACONS OF THE CHURCH TO GET A CHILD IN AND THROUGH THE DEACONS OF THE CHURCH TO GET A CHILD OUT. I WAS RAISED IN THE CHURCH OF CHRIST, AND MY UNCLE WAS AN ELDER IN THE CHURCH OF CHRIST, AND MY MOTHER WAS A MEMBER THERE, AND THEY –

Q WERE YOU AN ACTIVE MEMBER OF THE CHURCH AT THAT TIME?

A NO. I WAS A DRUNK.

Q YOU PLACED TED IN TIPTON'S CHILDREN'S HOME –

A YES.

Q – IN OKLAHOMA?

A I DID.

Q AND HOW OLD WAS HE AT THIS TIME?

A FIVE, ALMOST SIX. I PUT HIM THERE SO THAT HE WOULD BE ABLE TO START TO SCHOOL WHEN HE WAS SIX.

Q HOW LONG DID HE REMAIN IN THE HOME?

A FIVE YEARS.

Q HOW MANY TIMES DID YOU SEE HIM DURING THAT FIVE YEARS?

[773] A TWICE.

Q NOW, DOES HE HAVE AN AUNT AND UNCLE THAT LIVE IN OKLAHOMA?

A YES, MY BROTHER AND SISTER-IN-LAW. THEY WERE CONSIDERED HIS SPONSORS. THE SPONSORS WERE THE ONES THAT KEPT THE KIDS IN CLOTHING.

Q DID YOU HAVE ANY OTHER CHILDREN?

A YES. I HAD TWO OTHERS.

Q WHAT WERE THEIR NAMES?

A "KEITH EDWARD" AND "CARLA KATHRYN." KEITH WAS THE SECOND CHILD AND –

Q IS KEITH A LITTLE YOUNGER THAN TED?

A THREE YEARS.

Q NOW, WHERE IS – WHERE WAS KEITH LIVING AT THIS TIME?

A WITH MY BROTHER AND SISTER-IN-LAW. THEY HAD LEGALLY ADOPTED HIM AT THAT TIME.

Q YOU HAD GIVEN KEITH UP?

A YES . . . WHEN HE WAS TWO.

Q WOULD TED GO FROM THE CHILDREN'S HOME OVER TO HIS AUNT AND UNCLE'S HOUSE TO VISIT AND –

A YES. SINCE THEY WERE HIS SPONSORS, THEY HAD VISITING PRIVILEGES. HE COULD GO THERE DURING THEIR SUMMER VACATION, CHRISTMAS, ANY HOLIDAYS THAT THEY HAD. THEY

HAD THE PRIVILEGE OF TAKING THEM BECAUSE THEY WERE HIS SPONSORS.

Q NOW, I THINK YOU MENTIONED THAT TED STAYED THERE – HOW [774] LONG? FIVE YEARS?

A FIVE YEARS.

Q AND HE WAS HOW OLD WHENEVER HE GOT OUT?

A TEN, ALMOST ELEVEN.

Q DID HE COME TO LIVE WITH YOU AT THAT TIME?

A YES.

Q HERE IN SAN ANGELO?

A YES.

Q WHERE WAS HIS FATHER?

A I – I DON'T KNOW. I THINK GRAND PRAIRIE.

Q NOW, AFTER TED CAME BACK TO LIVE WITH YOU HERE IN SAN ANGELO, WHAT TOOK PLACE OVER THE NEXT SEVERAL YEARS?

A WELL, I HAD REMARRIED. MY HUSBAND AND I HAD TURNED OUR LIVES AROUND COMPLETELY. WE HAD STARTED TO CHURCH, BUT HE WOULDN'T GO TO THE CHURCH OF CHRIST; SO I JOINED THE FUNDAMENTAL BAPTIST CHURCH WITH HIM. I WOULD HAVE GONE ANYPLACE THAT HE WANTED TO GO TO GET IN CHURCH.

Q YOU'RE TALKING ABOUT YOUR HUSBAND NOW?

A MY HUSBAND. WE HAD, AS I SAID, TOTALLY TURNED OUR LIVES AROUND. WE HAD QUIT DRINKING. WE DECIDED WE WERE GOING TO STAY AT HOME AND RAISE THE KIDS. WE WERE TRYING TO PROVE THAT WE WERE FIT SO THAT WE COULD GET TED OUT.

Q IT DIDN'T TURN OUT QUITE THAT WAY, THOUGH, DID IT?

A WELL, THE ELDERS OF THE CHURCH HERE, THEY CAME OUT THREE DIFFERENT TIMES AND DECIDED WE HADN'T BEEN MARRIED LONG [775] ENOUGH, HADN'T WORKED LONG ENOUGH IN THE CHURCH. MY HUSBAND WAS A SUNDAY-SCHOOL TEACHER AND THE CHURCH TREASURER. I WAS THE CHURCH SECRETARY. AND FINALLY, I WENT BACK TO OKLAHOMA TO THE JUDGE THAT HELPED ME GET TED UP THERE, AND HE HELPED ME GET HIM OUT SO HE COULD COME AND LIVE WITH US. WE HAD BEEN MARRIED THREE YEARS AT THAT TIME.

Q SO HE CAME BACK TO SAN ANGELO AND LIVED WITH YOU –

A YES.

Q – AND YOUR HUSBAND?

A YES. AND MY DAUGHTER.

Q AND YOUR DAUGHTER. WHAT'S YOUR DAUGHTER'S NAME?

A "CARLA KATHRYN COLE."

Q OKAY. YOU CALL HER "CATHY"?

A "CATHY."

Q NOW, AFTER YOU BROUGHT TED BACK TO SAN ANGELO, DID YOU ENROLL HIM IN SCHOOL?

A YES.

Q WHERE AT?

A SAN JACINTO.

Q OKAY. WHAT KIND OF GRADES DID TED MAKE WHILE HE WAS IN SCHOOL?

A HE MADE --

Q DO YOU REMEMBER?

A – PRETTY GOOD GRADES. YEAH.

[776] Q DID HE HAVE ANY – DID HE GET IN TROUBLE WITH THE LAW IN THE NEXT FEW YEARS FROM THE TIME THAT YOU BROUGHT HIM BACK TO SAN ANGELO UP UNTIL FIVE YEARS LATER?

A NO.

Q NO PROBLEM AT ALL?

A TED WAS NEVER A PROBLEM AT ALL. HE WAS – HE TRIED TO BE A PERFECT CHILD. THAT'S WHAT WE EXPECTED OF HIM, AND THAT'S WHAT HE TRIED TO BE.

Q WHEN WAS THE NEXT TIME THAT TED SAW HIS FATHER?

A I DON'T REMEMBER THE YEAR. I THINK TED WAS EITHER FOURTEEN OR ALMOST FIFTEEN. AND

HIS STEP-GRANDFATHER, HIS FATHER'S STEPFATHER, DIED AT ROBERT LEE. WE HAD STAYED IN CLOSE CONTACT WITH THE GRANDPARENTS. AND I DEBATED WHETHER OR NOT TO TAKE TED UP THERE TO THE FUNERAL AND DECIDED THAT HE WAS OLD ENOUGH AND, YOU KNOW, HE WAS CLOSE TO THEM; AND I TOOK HIM UP THERE TO THE FUNERAL. AND HIS FATHER WAS THERE. FIRST TIME HE'D SEEN HIM SINCE HE WAS FIVE.

Q HE HADN'T SEEN HIS FATHER IN TEN YEARS?

A NO. THE LAST TIME HE SAW HIS FATHER, HIS FATHER BROUGHT HIM TO SAN ANGELO. HE HAD TOOK HIM OFF TO ABILENE AND BROUGHT HIM IN SAN ANGELO AND DROPPED HIM OFF A BLOCK FROM WHERE HE THOUGHT I LIVED AND SAID, "YOUR MOTHER LIVES DOWN IN THAT BLOCK. GO FIND HER," AND DROVE OFF. THAT'S THE LAST TIME HE HAD SEEN HIS FATHER.

[777] Q AND THE NEXT TIME HE SAW HIM WAS AT –

A AT THE FUNERAL.

Q AT THE FUNERAL.

A AND HIS FATHER TOLD HIM, "HAD I KNOWN WHERE YOU WERE ALL THESE YEARS, YOU WOULD HAVE BEEN WITH ME, YOU KNOW." OF COURSE, HE KNEW BECAUSE WE WERE IN CLOSE CONTACT WITH HIS MOTHER AND STEPFATHER. BUT HE LET TED BELIEVE – AND HE WAS ENROLLED AT A SEMINARY AT THAT TIME, ABOUT TO BE A PREACHER,

AND HAD ALREADY BEEN MARRIED FOUR TIMES, BUT THEY DIDN'T KNOW THAT.

ANYWAY, ABOUT TWO WEEKS AFTER THAT, TED'S GRANDMOTHER CAME BY AND SAID SHE WAS GOING TO VISIT CHARLES, COULD TED GO UP THERE FOR A WEEK. WELL, HE WAS OLD ENOUGH THAT I –

THE COURT: YOU'RE GOING TO HAVE TO PUT THIS ON A QUESTION-AND-ANSWER BASIS.

MR. SPENCE: OKAY.

THE WITNESS: I'M SORRY.

THE COURT: THIS IS AN IMPROPER MANNER OF QUESTIONING.

MR. SPENCE: I UNDERSTAND, YOUR HONOR.

BY MR. SPENCE:

Q YOU LET TED GO TO DALLAS TO SEE HIS FATHER?

A YES.

[778] Q HOW LONG DID HE STAY IN DALLAS?

A ALMOST A YEAR.

Q WITH HIS FATHER?

A YES.

Q DID YOU SEE HIM IN THAT YEAR'S TIME?

A NO.

Q WAS HE A DIFFERENT PERSON WHEN HE CAME BACK?

A NOT OUTWARDLY.

Q HAS TED EVER BEEN AN EMOTIONAL-TYPE PERSON WITH – THAT SHOWS HIS EMOTIONS?

A NEVER.

Q ARE YOU THAT TYPE OF PERSON? DO YOU SHOW YOUR EMOTIONS?

A NEVER.

Q NOW, AFTER TED CAME BACK FROM LIVING IN DALLAS WITH HIS FATHER, HE CAME BACK TO LIVE WITH YOU?

A YES.

Q WAS HE WORKING?

A YES, HE WENT TO WORK.

Q WHERE WAS HE WORKING?

A IT WAS CALLED "WINN DIXIE THEN. IT'S NOW . . .

Q HOW LONG DID HE REMAIN AT THAT JOB?

A ABOUT THREE MONTHS, THE BEST I RECALL.

Q WERE THERE ANY PROBLEMS WITH THE LAW?

A NO.

Q HOW OLD WAS HE AT THIS TIME?

[779] A SIXTEEN.

Q SIXTEEN.

DID YOU KNOW A PERSON BY THE NAME OF "GARY DEDEKER"?

A YES.

Q WAS TED AND MR. DEDEKER GOOD FRIENDS?

A YES.

Q I BELIEVE WHEN TED WAS SIXTEEN, HE WAS CHARGED WITH THE MURDER OF GARY DEDEKER.

A YES.

Q WAS THERE A TRIAL THAT TOOK PLACE OVER THAT?

A YES.

Q HOW DID THAT TRIAL RESULT – WHAT WAS THE RESULT OF THAT TRIAL?

A A HUNG JURY.

Q A HUNG JURY. WELL, HOW WAS TED CONVICTED OF MURDER?

A CAN I EXPLAIN?

Q YES, PLEASE.

MR. ALCALA: YOUR HONOR, I OBJECT TO THAT SINCE IT'S NOT RESPONSIVE. SHE DIDN'T EVEN – SHE DIDN'T ANSWER THE QUESTION THAT NEEDED EXPLAINING. WE OBJECT.

THE COURT: MR. SPENCE, WE'RE GOING TO KEEP THIS ON A QUESTION-AND-ANSWER BASIS. THE LAW DOES NOT ALLOW A NARRATIVE TESTIMONY. SO YOU MUST KEEP IT ON A QUESTION-AND-ANSWER BASIS.

[780] MR. SPENCE: ALL RIGHT.

BY MR. SPENCE:

Q WAS TED CONVICTED OF MURDER, MS. COLE – MS. HICKEY?

A HE PLEADED "GUILTY" TO MURDER.

Q DO YOU KNOW WHY HE PLEAD "GUILTY"?

THE COURT: MR. SPENCE – SEND THE JURY OUT.

[THEREUPON, THE JURY WAS RETIRED FROM THE COURTROOM, AND THE FOLLOWING PROCEEDINGS WERE HAD OUTSIDE THE PRESENCE AND HEARING OF THE JURY, TO-WIT:]

MR. SPENCE: YOUR HONOR, WE'LL WITHDRAW THE – THE QUESTION, YOUR HONOR, AND REASK IT.

THE COURT: MR. SPENCE, THE JURY IS NOT IN THE ROOM, THEY HAVE BEEN WITHDRAWN.

AN INDIVIDUAL PLEADS "GUILTY" BECAUSE THEY ARE GUILTY AND FOR NO OTHER REASON. IF ANY PARTY EVER ENTERS A PLEA OTHER THAN THAT, IT IS AN IMPROPER PLEA.

MR. SPENCE: I UNDERSTAND.

THE COURT: NOW, ARE YOU TELLING – ARE YOU ATTEMPTING TO ATTACK THAT CONVICTION OF 1970-WHATEVER?

MR. SPENCE: NO, I'M NOT ATTEMPTING TO ATTACK

[781] <OUTSIDE PRESENCE AND HEARING OF THE JURY>

THAT CONVICTION, YOUR HONOR.

THE COURT: ALL RIGHT. FOR WHAT PURPOSE ARE YOU ASKING THAT QUESTION?

MR. SPENCE: I WILL WITHDRAW THAT QUESTION.

THE COURT: NOW, IF YOU HAVE A PROPER PURPOSE, I WILL ALLOW YOU TO ASK THE QUESTION, BUT YOU'RE GOING TO HAVE TO TELL ME WHAT THE PURPOSE IS. AND I'M JUST TELLING YOU, I'M NOT RESTRICTING YOU – I'M NOT GOING TO RESTRICT YOU FROM ASKING THE QUESTION IF YOU GIVE ME A PROPER PURPOSE.

MR. SPENCE: WELL, YOUR HONOR, I CAN SHOW THE PURPOSE FOR THE PLEA OF "GUILTY," AND THAT IS THE FACT THAT HE WAS GUILTY OF SHOOTING MR. DEDEKER.

MR. ALCALA: YOUR HONOR –

MR. FOHN: YOUR HONOR –

MR. SMITH: YOUR HONOR –

MR. SPENCE: BUT I CAN GO – WELL . . .

THE COURT: WELL, LET'S KEEP – THAT'S FINE. WE'RE OUTSIDE THE PRESENCE OF THE JURY. I'M RELATIVELY – I'M TRYING TO BE AS FLEXIBLE AS POSSIBLE.

MR. SPENCE: I WOULD LIKE TO GO INTO – WELL, I'LL WITH – I'LL WITHDRAW THE QUESTION AS TO THE PLEA OF "GUILTY." I'D LIKE TO GO INTO THE REASON FOR THE

[782] <OUTSIDE PRESENCE AND HEARING OF THE JURY>

SHOOTING.

THE COURT: THE REASONS FOR THE SHOOTING ... NOW, I HAVE A STIPULATION OF EVIDENCE THAT'S BEEN ADMITTED. OKAY? NOW, THAT STIPULATION SETS OUT THE INCIDENT AS IT OCCURRED. IF THAT IS AN ATTACK UPON THAT STIPULATION, THEN I HAVE GREAT DIFFICULTY. THAT'S NUMBER ONE. NUMBER TWO, ANY TESTIMONY SHE HAS AS TO THE REASON FOR THE SHOOTING IS GOING TO BE HEARSAY –

MR. FOHN: HEARSAY.

THE COURT: – AND, THEREFORE, IT'S NOT ADMISSIBLE.

NOW, CERTAIN HEARSAY MATTERS ARE ADMISSIBLE AS TO OPINIONS AND THINGS OF THAT NATURE. AND I'M GOING TO GIVE YOU BROAD – I'M GOING TO GIVE YOU A BROAD BERTH IN REFERENCE TO THE AREA OF THE ISSUE OF PUNISHMENT IN A CAPITAL MURDER CASE. I'LL GIVE YOU EVERYTHING I CAN GIVE YOU, MR. SPENCE, JUST AS I'LL GIVE THE STATE EVERY – EVERY OPPORTUNITY

THAT THEY CAN HAVE WITHIN THE CONFINES OF THE RULES OF EVIDENCE THAT EXIST IN THE STATE OF TEXAS.

NOW, I DON'T SEE HOW YOU'RE GOING TO GET INTO THAT BASED UPON HEARSAY, BUT IF YOU CAN TELL ME HOW YOU'RE GOING TO GET THERE AND WHERE YOU'RE GOING TO, THEN I'LL CERTAINLY ALLOW IT. I'M NOT TRYING TO – I WANT YOU TO

[783] <OUTSIDE PRESENCE AND HEARING OF THE JURY>

BE ABLE TO DO THE VERY BEST YOU CAN FOR YOUR CLIENT AND PUT ON WHATEVER YOU BELIEVE IS NECESSARY FOR – IN YOUR CLIENT'S INTEREST. BUT THAT'S HEARSAY.

MR. SPENCE: I CANNOT GET THERE FROM HERE, YOUR HONOR.

THE COURT: WELL, THAT'S RANK HEARSAY.

MR. SPENCE: I UNDERSTAND THAT.

THE COURT: SO YOU GO THE WAY YOU WANT TO GO IN REFERENCE TO THAT. BUT IF WE'RE IN REFERENCE TO AN ATTACK OF A JUDGMENT THAT'S ENTERED, A PLEA OF "GUILTY" IS ENTERED BECAUSE AN INDIVIDUAL IS GUILTY AND FOR NO OTHER REASON. THAT'S WHAT THE LAW REQUIRES. THAT'S WHY THIS COURT DOESN'T TAKE NOLO CONTENDERE PLEAS UNLESS THE PERSON SAYS THEY'RE GUILTY.

MR. SPENCE: I UNDERSTAND, YOUR HONOR.

THE COURT: BRING THE JURY BACK IN.

[THEREUPON, THE JURY WAS RETURNED TO THE COURTROOM, AND THE FOLLOWING PROCEEDINGS WERE HAD WITHIN THE PRESENCE AND HEARING OF THE JURY, TO-WIT:]

THE COURT: BE SEATED.

[784] LET'S PROCEED. PRIOR TO SENDING THE JURY OUT, YOU HAD THE WITNESS ON EXAMINATION –

MR. SPENCE: THANK YOU, YOUR HONOR.

THE COURT: – MR. SPENCE. YOU MAY PROCEED.

DIRECT EXAMINATION [RESUMED]

BY MR. SPENCE:

Q MS. HICKEY, DID TED PLEAD "GUILTY" TO THAT MURDER CHARGE IN 1974 –

A YES, HE DID.

Q – OF GARY DEDEKER?

AT THAT TIME HIS FATHER WAS IN DALLAS?

A GRAND PRAIRIE.

Q IN GRAND PRAIRIE.

I BELIEVE THERE – WAS THERE A CAR OR ANYTHING TAKEN AFTER THAT SHOOTING?

A YES.

Q WHERE DID TED GO IN THE CAR?

A TO HIS FATHER.

Q AND THEN HE WAS BROUGHT BACK HERE TO SAN ANGELO TO STAND TRIAL?

A LATER IN THE WEEK.

Q AFTER TED WENT TO PRISON, DID YOU GO AND SEE HIM IN PRISON?

A YES.

[785] Q HOW MANY TIMES? DO YOU KNOW?

A I DON'T KNOW. I WENT FOR HIS GRADUATION, MOTHER'S DAYS, THE DAYS THAT I COULD – THE WEEKENDS THAT I COULD GET THE MONEY TOGETHER. I FOUND A WOMAN IN CISCO WHO HAD A HUSBAND DOWN THERE, AND WE STARTED GOING TOGETHER SO WE COULD GO MORE OFTEN. I WENT AS OFTEN AS I COULD POSSIBLY GO.

Q TED GOT OUT OF PRISON IN WHAT YEAR? 1980?

A YES.

Q HE CAME BACK TO SAN ANGELO TO LIVE?

A YES.

Q WHO WAS HE LIVING WITH AT THAT TIME?

A ME.

Q WHERE WAS HE WORKING?

A HE WENT TO WORK FOR WESTERN IRON WORKS.

Q HOW LONG DID HE WORK THERE?

A TWO YEARS.

Q THEN WHERE DID HE GO?

A HIS FATHER CAME DOWN AND INVITED HIM TO COME AND LIVE WITH HIM AT DALLAS; HE COULD FIND HIM A BETTER JOB UP THERE.

Q HOW LONG WAS HE UP THERE?

A TWO YEARS. I'M – I'M NOT SURE.

Q HOW MANY CHILDREN DO YOU HAVE ALTOGETHER, MS. HICKEY?

A I HAVE FOUR LIVING.

Q FOUR LIVING CHILDREN. WHERE ARE THEY AT AT THE PRESENT [786] TIME?

A PARDON ME?

Q TED IS HERE ON CAPITAL MURDER CHARGES. WHERE ARE THE REST OF THEM?

A MY BABY BOY, MICHAEL HICKEY, IS IN COUNTY JAIL ON A MURDER CHARGE. MY SECOND OLDEST SON IS LIVING IN OKLAHOMA. HE'S THE ONE THAT WAS ADOPTED BY MY BROTHER AND SISTER-IN-LAW. AND MY DAUGHTER IS IN ABILENE.

Q NOW, I BELIEVE KEITH IS THE ONE IN – IN OKLAHOMA; IS THAT CORRECT?

A YES.

Q HAS HE EVER BEEN IN TROUBLE WITH THE POLICE OR WITH THE LAW?

A YES.

Q WHAT KIND OF CHARGE?

A ATTEMPTED MURDER.

Q WHERE WAS THIS?

A IN OKLAHOMA.

Q AND I BELIEVE THAT KELLY HICKEY IS YOUR DAUGHTER-IN-LAW.

A YES.

Q AND SHE'S IN JAIL AT THE PRESENT TIME ON CAPITAL MURDER CHARGES?

A YES.

Q DO YOU HAVE ANOTHER SON-IN-LAW BY THE NAME OF – WHAT IS HIS NAME?

[787] A "LESLIE MARSH."

Q IS HE IN JAIL AT THE PRESENT TIME?

A YES.

Q WHAT IS THE CHARGE?

A CAPITAL MURDER.

MR. SPENCE: I HAVE NO FURTHER QUESTIONS.

MR. ALCALA: THE STATE HAS –

THE COURT: DO YOU HAVE ANY QUESTIONS OF THIS WITNESS?

MR. ALCALA: THE STATE HAS NO QUESTIONS, YOUR HONOR.

THE COURT: YOU MAY STEP DOWN.

[THEREUPON, THE WITNESS WAS EXCUSED FROM THE WITNESS STAND.]

THE COURT: CALL YOUR NEXT WITNESS.

MR. SPENCE: CALL BARBARA DEAN, YOUR HONOR.

THE COURT: BARBARA DEAN?

MR. SPENCE: DEAN.

THE COURT: I'M NOT TRYING TO RESTRICT YOU, MR. SPENCE. HOW MANY WITNESSES DO YOU THINK YOU'RE GOING TO HAVE? I'M JUST TRYING TO WORK OUT MY TIME FRAME.

MR. SPENCE: I'VE GOT FOUR, YOUR HONOR.

[788] THE COURT: ALL RIGHT. FOUR MORE?

MR. SPENCE: FOUR, YES, SIR.

THE COURT: FOUR MORE. ALL RIGHT.

COME FORWARD, MA'AM, AND BE SEATED. HAVE YOU BEEN PREVIOUSLY SWORN?

MR. SPENCE: NO, YOUR HONOR.

MS. BARBARA DEAN: YES.

THE COURT: I BELIEVE SHE HAS BEEN PREVIOUSLY SWORN.

MR. SPENCE: YEAH. SHE WAS THIS MORNING, AND I –

THE COURT: AND THE COURT EXPLAINED TO YOU THE RULE, DID IT NOT?

MS. BARBARA DEAN: YES, SIR.

THE COURT: YOU MAY PROCEED.

THEREUPON,

BARBARA ANN DEAN

WAS CALLED AS A WITNESS ON BEHALF OF THE DEFENDANT AND, HAVING BEEN FIRST DULY SWORN, TESTIFIED AS FOLLOWS, TO-WIT:

DIRECT EXAMINATION

BY MR. SPENCE:

Q MS. DEAN, WHAT IS YOUR FULL NAME?

A "BARBARA ANN DEAN."

[789] Q OKAY. AND WHERE DO YOU LIVE?

A IN DUNCAN, OKLAHOMA.

Q IN DUNCAN, OKLAHOMA?

A YES, SIR.

Q ARE YOU THE LEGAL PARENT OF TED COLE'S BROTHER?

A YES, I AM.

Q WHAT IS HIS NAME?

A "KEITH EDWARD DEAN."

Q "KEITH DEAN." WAS HE LEGALLY ADOPTED BY YOU AND YOUR HUSBAND?

A YES, SIR.

Q WHERE WAS THIS – WHERE. DID THIS TAKE PLACE AT?

A IN DUNCAN.

Q IN DUNCAN, OKLAHOMA?

A YES, SIR.

Q WHEN?

A IN 1962.

Q NOW, CAN YOU GO BACK TO THE TIME WHEN TED WAS AT THE TIPTON'S HOME IN OKLAHOMA? WHAT – HOW OLD WAS HE WHENEVER HE WENT TO THAT ORPHAN'S HOME?

A WELL, HE WAS ALMOST SIX. IT WAS JUST BEFORE HIS SIXTH BIRTHDAY.

Q HOW LONG DID HE STAY THERE?

A FOUR YEARS.

Q FOUR YEARS? NOW, DURING THIS FOUR-YEAR PERIOD THAT HE [790] WAS THERE, DID HE EVER COME TO VISIT WITH YOU AND YOUR HUSBAND?

A YES, SIR. WE WERE HIS – I – YOU WOULDN'T CALL IT "GUARDIANS," BUT AT TIPTON THEY TRY TO HAVE A FAMILY SUPPORT THE CHILDREN THAT

ARE THERE. AND WE SUPPORTED TED AT THAT TIME WITH CLOTHES AND TOOK HIM TO OUR HOME FOR VACATIONS AND CHRISTMAS TIMES AND SUCH.

Q WAS KEITH AT YOUR HOME AT THIS TIME WHENEVER TED WOULD COME TO VISIT YOU?

A YES, SIR.

Q AND KEITH WAS TED'S FULL BROTHER?

A YES.

Q DID TED EVER SHOW ANY EMOTION OR ANY FEELINGS OF ANY KIND ABOUT THESE VISITS?

A NO, SIR. AT THE TIME THE BOYS WOULD HAVE A REAL GOOD TIME WHILE TEDDIE WAS THERE, BUT WHEN WE WOULD TAKE HIM BACK, IT WAS JUST LIKE – HE SHOWED NO EMOTIONS OF WANTING TO STAY WITH US OR WANTING TO GO BACK. IT WAS . . .

Q DO YOU KNOW TED'S FATHER, CHARLES COLE?

A YES, SIR.

Q DID HE EVER ATTEMPT TO SEE HIM WHILE HE WAS IN THE CHILDREN'S HOME THERE IN –

A NOT TO MY KNOWLEDGE.

Q – IN OKLAHOMA?

HAVE YOU AND YOUR HUSBAND TRIED TO ADOPT TED?

[791] A WE DID AT ONE TIME JUST BEFORE NANCY, HIS MOTHER, TOOK HIM OUT OF TIPTON HOME. WE FELT LIKE THAT – THAT WE COULD HANDLE IT, BUT AT THAT TIME – I DON'T KNOW WHAT YOU WANT ME TO SAY – I MEAN, HOW MUCH. BUT THERE WAS SOME STIPULATIONS.

Q OKAY. WHAT – WERE THERE SOME STIPULATIONS?

A YES. THEY SAID IF WE ADOPTED HIM, THEN WE'D HAVE TO PROMISE THAT HE WOULD BE IN CHURCH THREE TIMES A WEEK WITH NO EXCEPTION. AND WE TOLD THEM WE DIDN'T KNOW IF WE COULD PROMISE THAT OR NOT.

Q SO THAT ADOPTION NEVER WENT THROUGH?

A NO. WHEN WE TALKED TO NANCY ABOUT IT RIGHT AFTER WE GOT HOME FROM TALKING TO THEM, SHE SAID THAT SHE WANTED TO GET HIM OUT, AND SO SHE STARTED PROCEEDINGS HERSELF.

Q NOW, YOUR SON, KEITH, CAME BACK TO TEXAS TO VISIT WITH HIS MOTHER, I BELIEVE, AT ONE TIME?

A YES, SIR, WHEN HE –

Q WHEN WAS THAT?

A – WAS FIFTEEN.

Q WHEN HE WAS FIFTEEN?

A YES, SIR.

Q DID HE GET IN TROUBLE HERE IN SAN ANGELO?

A NOT TO MY KNOWLEDGE.

Q OKAY.

A I DON'T REMEMBER THEM – KNOWING ANYTHING ABOUT ANY [792] TROUBLE HERE IN SAN ANGELO.

Q OKAY. WHERE DID HE GET IN TROUBLE AT?

A IN DUNCAN.

Q IN DUNCAN, OKLAHOMA?

A UH-HUH.

Q WHAT WAS THE – WHAT TYPE OF TROUBLE WAS IT?

A OH, MOSTLY WRITING CHECKS, AND HE GOT – LET'S SEE . . . AT ONE TIME HE GOT PICKED UP FOR STEALING.

MR. SPENCE: I HAVE NO FURTHER QUESTIONS, YOUR HONOR.

THE COURT: DO YOU HAVE ANY QUESTIONS OF THIS WITNESS?

MR. ALCALA: I HAVE NO QUESTIONS, YOUR HONOR.

THE COURT: YOU MAY STEP DOWN.

* * *

[800] JARVIS WRIGHT, Ph.D.,

WAS CALLED AS A WITNESS ON BEHALF OF THE DEFENDANT AND, HAVING BEEN FIRST DULY SWORN, TESTIFIED AS FOLLOWS, TO-WIT:

DIRECT EXAMINATION

BY MR. SPENCE:

Q MR. WRIGHT, WOULD YOU TELL US SOMETHING ABOUT YOUR EDUCATIONAL BACKGROUND, PLEASE? OR, LET ME BACK UP JUST A LITTLE BIT. IS IT "DOCTOR" WRIGHT?

A YES.

Q YOU DO HAVE A Ph.D.?

A I HAVE A Ph.D.

Q OKAY. DR. WRIGHT, YOU'RE A – YOU LIVE HERE IN SAN ANGELO?

A LIVE HERE IN SAN ANGELO, YES.

Q WOULD YOU TELL US SOMETHING ABOUT YOUR EDUCATIONAL BACKGROUND?

A I'M A PSYCHOLOGIST. I HAVE A BACHELOR'S DEGREE. MY BACHELOR'S IS IN MATH AND PHYSICS. IT'S FROM THE UNIVERSITY – ABILENE CHRISTIAN UNIVERSITY. I HAVE A MASTER'S DEGREE IN PSYCHOLOGY FROM ABILENE CHRISTIAN UNIVERSITY, 1969. IN 1976 I EARNED A Ph.D., DOCTORATE DEGREE, IN PSYCHOLOGY AT THE UNIVERSITY OF SOUTHERN MISSISSIPPI.

[801] Q DO YOU HOLD ANY CERTIFICATIONS OR LICENSES, SIR?

A I'M LICENSED IN THE STATE OF TEXAS, AND I'M LICENSED IN THE STATE OF TENNESSEE AS A PSYCHOLOGIST, I'M LISTED IN THE HEALTH SERVICE PROVIDERS IN PSYCHOLOGY BOTH NATIONALLY AND IN TEXAS.

Q WOULD YOU TELL US SOMETHING ABOUT YOUR EMPLOYMENT BACKGROUND?

A BEGAN WORKING IN PSYCHOLOGY AT THE MASTER'S DEGREE LEVEL AND CONTINUED WORKING UNTIL I WENT BACK FOR MY DOCTORATE DEGREE. I'VE BEEN A PSYCHOLOGIST IN SAN ANGELO SINCE 1977. WORKED FOR A WHILE AT THE UNIVERSITY OF TENNESSEE IN NASHVILLE AS COUNSELLING CENTER DIRECTOR. THIS IS AFTER FINISHING THE DOCTORATE. FINISHED THE DOCTORATE IN 1976. I'VE BEEN SELF-EMPLOYED HERE IN SAN ANGELO IN PRIVATE PRACTICE AS A PSYCHOLOGIST SINCE 1980.

Q ARE YOU THE HOLDER OF ANY AWARDS OR HONORS?

A I'VE BEEN ON SEVERAL COMMITTEES AND THINGS LIKE THIS THROUGH THE STATE. NOT ANY NOBEL PRIZES OR ANYTHING LIKE THAT.

Q OKAY. DR. WRIGHT, HOW DID YOU GET INVOLVED IN THIS CASE TO BEGIN WITH?

A YOU CALLED AND ASKED IF I'D BECOME INVOLVED IN IT.

Q OKAY. HAVE YOU EVER EXAMINED TED COLE?

A YES, I HAVE.

Q WOULD YOU IDENTIFY HIM FOR THE RECORD, SIR?

[802] A TED COLE IS THE PERSON SEATED TO YOUR RIGHT.

MR. SPENCE: YOUR HONOR, WE WOULD HAVE THE RECORD REFLECT THAT DR. WRIGHT IDENTIFIED TED CALVIN COLE.

THE COURT: THE RECORD WOULD SO REFLECT.

PROCEED.

BY MR. SPENCE:

Q WHEN DID YOU FIRST IDENTIFY – EXAMINE MR. COLE?

A FIRST SAW MR. COLE ON MARCH – OR, ON FEBRUARY 25, 1988.

I SAW HIM AGAIN ON SEVERAL OTHER OCCASIONS: MARCH 11, MARCH 22, APRIL 4, APRIL 25, AND FINALLY, ON MAY 17 OF THIS YEAR.

Q HAVE YOU SPENT QUITE A BIT OF TIME WITH HIM ON THOSE VARIOUS OCCASIONS?

A YES, I HAVE. I'D SUPPOSE A TOTAL FACE-TO-FACE TIME SOMEWHERE AROUND EIGHT TO TEN HOURS, SOMETHING IN THAT NEIGHBORHOOD.

Q HAVE YOU CONDUCTED EXAMINATIONS OF HIM –

A YES.

Q – OTHER THAN SPENDING TIME WITH HIM?

A YES, INDEED I HAVE.

Q WHAT HAVE YOU DONE IN THE WAY OF EXAMINING MR. COLE?

A ON THESE VARIOUS OCCASIONS I INTERVIEWED HIM EACH TIME, TALKED WITH HIM AT SOME LENGTH. DURING THIS TIME ALSO, I [803] ADMINISTERED A RATHER EXTENSIVE BATTERY OF PSYCHOLOGICAL TESTS. THESE TESTS INCLUDED THE WECHSLER ADULT INTELLIGENCE SCALE, REVISED. THAT'S A MAJOR INTELLIGENCE TEST. HE SCORED QUITE HIGH ON THAT. IN FACT, I THINK HE EARNED A PERFORMANCE I.Q. OF 132 – I DON'T THINK THERE ARE MANY PEOPLE IN THIS ROOM WHO COULD EARN THAT HIGH A SCORE – FULL-SCALE I.Q. SCORE OF 121, WHICH WAS – WAS QUITE HIGH.

I GAVE HIM THE WIDE RANGE ACHIEVEMENT TEST, REVISED, WHICH WAS A TEST OF ACADEMIC FUNCTIONING. HE DOES QUITE WELL. AND HE'S QUITE LITERATE IN READING AND SPELLING, NOT REAL GOOD IN ARITHMETIC.

I ADMINISTERED THE RORSCHACH INKBLOTS, WHICH ARE THE INKBLOTS THAT WE HAND TO A PERSON AND – YOU'VE SEEN THEM ON T.V., THAT SORT OF THING. ASKED HIM TO TELL ME WHAT THEY LOOK LIKE AND WATCHED AS HE WENT ABOUT THE TASK OF SAYING WHAT THE INKBLOTS LOOKED LIKE.

I USED THE BENDER MOTOR GESTALT TEST, WHICH ARE SOME – SOME DRAWINGS THAT A

PERSON'S GIVEN, A SET OF DRAWINGS, AND ASKED TO COPY THEM ON A SHEET OF PAPER. IN FACT, IS GIVEN SEVERAL DIFFERENT OPTIONS OF HOW TO COPY THEM AND THE WAY TO GO ABOUT COPYING. AND THE WAY THEY ACT AS THEY'RE COMPLETING THIS TASK IS IMPORTANT. HAD HIM JUST DRAW SOME THINGS LIKE HOUSES, TREES, PERSONS, THESE KINDS OF DRAWINGS. LOOKED AT THOSE.

I ADMINISTERED A COMPETENCY-TO-STAND-TRIAL QUESTION-[804]NAIRE, WHICH JUST MADE SURE THAT HE WAS COMPETENT, THAT HE COULD COME INTO THE COURTROOM, UNDERSTAND WHAT WAS HAPPENING IN THE COURTROOM, RECOGNIZE THE ATTORNEY-CLIENT RELATIONSHIP AND DEAL WITH THAT, AND HAVE A RATIONAL AND FACTUAL UNDERSTANDING OF THE PROCEEDINGS IN COURT.

I ADMINISTERED THE HAPTIC VISUAL DISCRIMINATION TEST. THIS IS GOING EVEN DEEPER. THE HAPTIC IS A VERY INTERESTING TEST THAT MEASURES HOW WELL THINGS ARE ACTUALLY FUNCTIONING IN THE CENTRAL NERVOUS SYSTEM. THE INDIVIDUAL HAS A SCREEN, AND THEY PUT THEIR HAND THROUGH A SCREEN, AND THE EXAMINER HANDS THEM OBJECTS IN THEIR HAND. AND THEY DO THIS WITH BOTH HANDS, AND THEY FEEL THE OBJECT. AND THE OBJECTS ARE DIFFERENT SHAPES AND SIZES AND TEXTURES AND CONFIGURATIONS. ONE OF THEM'S THE SHAPE OF A STAR; ONE OF THEM'S A CIRCLE, A TRIANGLE. THERE'S TERRY-CLOTH AND SAIL CLOTH AND BURLAP AND ALL OF THESE DIFFERENT SHAPES OR ALL OF THESE DIFFERENT TEXTURES. THERE ARE DIFFERENT SIZES. THERE'S NUTS AND BOLTS

OF DIFFERENT SIZES. THEN THEY'RE SHOWN PICTURES OF THE OBJECT AND ASKED TO IDENTIFY THE OBJECT THAT'S IN THEIR HAND. AND INABILITIES TO DO THIS CAN REFLECT DAMAGES, DYSFUNCTIONS, AT LEAST, IN THE CENTRAL NERVOUS SYSTEM. WE USE THIS KIND OF TEST TO EXAMINE FOR DEFICITS IN THE CENTRAL NERVOUS SYSTEM, BECAUSE IF WE KNOW THE HANDS ARE WORKING OKAY, IF WE KNOW THE SENSORY RECEPTORS ARE WORKING [805] OKAY, AND IF WE KNOW THE EYES ARE WORKING OKAY, THEN IF THERE ARE DIFFERENCES IN THEIR ABILITIES TO DO THESE KIND OF TASKS – LET'S SAY, IDENTIFY SHAPES OR IDENTIFY TEX-TEXTURES OR IDENTIFY SIZES – IF THERE ARE VERY BIG DIFFERENCES, WE CAN SAY, "WELL, SOMETHING'S WRONG IN THE CENTRAL NERVOUS SYSTEM. SOMETHING'S NOT WORKING." MAYBE IT'S BROKEN. MAYBE IT'S DAMAGED. DON'T KNOW ON THAT UNTIL WE HAVE – A LOT OF TIMES WE DON'T KNOW UNTIL THE INDIVIDUAL IS IN AN AUTOPSY SITUATION BECAUSE THOSE ARE THINGS WE CAN'T SEE WITH X-RAY MACHINES. SO WE'RE LOOKING FOR CENTRAL NERVOUS SYSTEM DAMAGE.

ANOTHER TEST I GAVE, ALSO LOOKING FOR CENTRAL NERVOUS SYSTEM PROBLEMS, WAS THE NUCAREN ASSESSMENT OF NEUROMUSCULAR DEVELOPMENT. THIS IS A TEST THAT INVOLVES TASKS LIKE STANDING ON ONE FOOT, STANDING BROAD JUMP, WALKING ALONG A STRAIGHT LINE, HAND STRENGTH. WE USE A HAND DYNAMOMETER TO MEASURE STRENGTH FROM ONE HAND TO THE OTHER. IS ONE HAND STRONGER OR WEAKER

THAN THE OTHER, OR ARE THEY BOTH THE SAME? CAN A PERSON EFFECTIVELY BALANCE THEMSELVES? THESE KINDS OF TASKS CAN GIVE US A LOT OF INFORMATION, AGAIN, AS TO WHAT'S HAPPENING IN THE CENTRAL NERVOUS SYSTEM, AS TO WHETHER SOMETHING COULD BE WRONG IN THE CENTRAL NERVOUS SYSTEM. I'M TALKING ABOUT THE PART RIGHT INSIDE HERE [INDICATING]. NOW, THE CENTRAL NERVOUS SYSTEM IS THE BRAIN.

[806] Q WHEN WAS THE LAST TIME YOU SAW TED?

A I SAW TED LAST ON MAY THE 17TH OF THIS MONTH.

Q WHY DID YOU SEE HIM ON THAT PARTICULAR DAY, SIR?

A ON THAT DAY I SAW HIM BECAUSE HE ATTEMPTED TO KILL HIMSELF. HE HAD ATTEMPTED SUICIDE. I CAME TO MAKE SURE THAT HE WAS STILL CAPABLE OF COMING IN AND UNDERSTANDING WHAT WAS GOING ON. I – I OBTAINED A CERVICAL COLLAR FOR HIM ON THAT DAY TO HIDE THE BANDAGES THAT WERE ON HIS THROAT AND NECK.

Q WHAT WAS HIS EMOTIONAL STATE ON THAT DAY?

A HE WAS VERY DISTRESSED, VERY DISTRAUGHT. HE SAID, "LET'S GO AHEAD AND GET IT OVER WITH NOW."

Q DO YOU HAVE AN OPINION AS TO – OR AN ESTIMATE AS TO HOW SERIOUS THE ATTEMPT WAS TO COMMIT SUICIDE?

A I DIDN'T SEE THE ACTUAL WOUND, AND I'M NOT A PHYSICIAN; SO I'M NOT QUALIFIED TO SAY HOW DEEP IT WAS OR WHAT VEINS IT CAME CLOSE TO. I DO UNDERSTAND THERE WAS A GREAT DEAL OF BLOOD ON HIS BED, AROUND THE AREA IN THE JAIL WHERE HE ATTEMPTED SUICIDE. BUT I – I DON'T KNOW HOW SERIOUS THE WOUND WAS BECAUSE THAT'S OUTSIDE MY FIELD.

Q WELL, WHAT DO YOU KNOW ABOUT TED'S BACKGROUND, DR. WRIGHT?

A I KNOW IT WAS A VERY DIFFICULT BACKGROUND. I KNOW TED HAS – THERE ARE A LOT OF GAPS IN THAT BACKGROUND.

APPARENTLY, HE'S HAD A VERY RUGGED, ROUGH CHILDHOOD. HE DOESN'T REMEMBER – HE SIMPLY DOESN'T HAVE ACCESS TO A LOT [807] OF MEMORIES ABOUT HIS CHILDHOOD AND HIS EARLY LIFE, AND THAT TELLS US A LOT MORE ABOUT THE PAIN OF HIS EARLIER LIFE, ABOUT THE PAIN HE PERHAPS EXPERIENCES NOW, THAN IF WE HAD A WHOLE DETAILED BIOGRAPHY OF TED. IT TELLS US HOW IT EFFECTS HIM TODAY.

Q WELL, WHAT EFFECT DOES – DOES THIS HAVE ON HIS PRESENT LIFE TODAY?

A I THINK HIS PERSONALITY IS VERY FRAGMENTED. I THINK – I DON'T THINK TED KNOWS TED VERY WELL AT ALL.

Q OKAY.

A I THINK THERE'S A GREAT DEAL OF TED THAT'S NOT – OF HIS – OF HIS LIFE, OF HIS REASONS, OF HIS MOTIVES, THAT ARE NOT ACCESSIBLE TO HIM, THAT HE SIMPLY DOESN'T RECOGNIZE.

Q WHAT – HOW IS HIS BACKGROUND GOING TO AFFECT HIS FUTURE?

A OBVIOUSLY, IT'S NOT A GOOD INDICATOR. ANY OF US THAT HAVE A BAD, VERY PAINFUL BACKGROUND HAVE LESS CHANCE OF A FUTURE. I THINK IN THE CASE OF TED – AND I THINK THE RESEARCH CERTAINLY INDICATES THAT INDIVIDUALS LIKE TED, INDIVIDUALS WHO HAVE HAD THIS KIND OF BACKGROUND, TEND TO BEGIN TO MAKE CHANGES AT ABOUT FORTY, FORTY-FIVE, FIFTY, SOMEWHERE IN THERE. THEY TEND TO MELLOW A BIT AND CHANGE A GOOD BIT. YOU CAN INFER THAT FROM SOME OF THE F.B.I. CRIME STATISTICS ON AGE AND CHANGES IN PERSONS.

YOU CAN GET THAT DIRECTLY – I THINK IT WAS "LYONS CHARACTER DISORDERS" BOOK IN 1982, AND I'M NOT SURE OF THE [808] PUBLISHER. WILLIAMS AND WILKINS, I THINK, BUT I'M NOT SURE OF THAT PUBLISHER. THAT BRINGS TOGETHER A LOT OF RESEARCH THAT'S BEEN DONE TO SHOW THAT THESE INDIVIDUALS MAKE A GREAT DEAL OF CHANGE AS THEY GET OLDER AND AS THEY MELLOW.

Q OKAY. I THINK YOU WERE CALLING THAT "BURNOUT" AT ONE TIME.

A "BURNOUT." THAT'S A GOOD WORD, "BURNOUT." INDIVIDUALS – THE FACTORS THAT ARE THERE THAT CAUSE MALADAPTIVE, MALADJUSTIVE BEHAVIORS TEND TO CHANGE. THE COMPASS GETS – YOUR COMPASS IS POINTED A DIFFERENT DIRECTION WHEN YOU'RE FORTY-FIVE THAN IT IS WHEN YOU'RE TWENTY-FIVE OR THIRTY-FIVE.

Q IS TED THE TYPE OF PERSON THAT – IF HE WAS WORKING AND SOMEBODY CAME ALONG AND ASKED HIM TO GO OR DO SOMETHING ELSE, WHAT WOULD HE DO?

A WELL, TED'S – TED LACKS A GREAT DEAL OF IMPULSE CONTROL. AND I THINK THAT'S IMPORTANT IN THESE TESTS I GAVE, THE ONE WHERE YOU PUT YOUR HAND THROUGH THE SCREEN AND THE TEST OF – OF THE BALANCE AND THIS SORT OF THING. IT INDICATES SOME CENTRAL NERVOUS DAMAGE OR VERY LIKELY CENTRAL NERVOUS DAMAGE. COMBINE THAT AND ALL THE OTHER FACTORS OF TED'S BACKGROUND, ALL THESE OTHER THINGS, WE'RE GOING TO HAVE AN INDIVIDUAL WITH SOME REAL PROBLEMS WITH IMPULSE CONTROL. IMPULSE IS SOMETHING HE – HE WANTS TO [809] DO. HE'S GOING TO TAKE THE SHORT BRIDGE INSTEAD OF THE LONG BRIDGE.

Q WHAT DO YOU MEAN BY THAT, NOW?

A THE SHORT BRIDGE IS THE DISTANCE TO AN IMMEDIATE GRATIFICATION, TO SOMETHING THAT'S GOING TO BE GOOD. "NOW, I'LL GO WITH THIS PERSON. I'LL DROP MY JOB, AND I'LL GO SOMEWHERE. I'LL DO SOMETHING THAT MAKES LIFE MORE EXCITING RIGHT NOW."

IT'S KIND OF LIKE, ON A DIFFERENT SCALE, "I'LL HAVE ANOTHER CIGARETTE RATHER THAN QUIT SMOKING FOR GOOD HEALTH FOR A LONG TIME." PEOPLE SOMETIMES WILL TAKE THE SHORT BRIDGE.

I THINK IN MOST OF TED'S LIFE HE'S GOING TO TAKE THE SHORT BRIDGE RATHER THAN THE LONG BRIDGE. "THE LONG BRIDGE" MEANS "IF I CONTINUE TO WORK, IF I STAY IN THIS JOB, IF I ESTABLISH SOME FRIENDSHIPS, THEN I CAN HAVE A LOT HAPPIER LIFE." BUT HE'S GOING TO TAKE THE SHORT BRIDGE, THE IMMEDIATE GRATIFICATION, RATHER THAN THE LONG BRIDGE. AND I THINK HIS HISTORY, I THINK THE PAIN IN HIS LIFE, I THINK THE LIKELINESS OF SOME NEUROLOGICAL DYSFUNCTION IN THE CENTRAL NERVOUS SYSTEM – I THINK ALL OF THIS PLAYS TOGETHER TO MAKE IT TO WHERE HE VERY OFTEN CAN'T BEHAVE IN ANOTHER WAY.

Q NOW, HAVE YOU SEEN THE DIARY THAT HE KEPT FROM AUGUST THE 31ST THROUGH THE 12TH OF DECEMBER?

[810] A I'VE SEEN THAT DIARY. I'VE NOT READ MUCH OF IT.

Q THERE'S A STATEMENT IN THERE TO THE EFFECT THAT HE WOULD LIKE TO GO TO THE CARIBBEAN OR THE MEDITERRANEAN AND SOMEWHERE IN THE SOUTH AND THE JUNGLES . . . SMUGGLE, STEAL, ROB, RAPE, PILLAGE, BE A MODERN-DAY VIKING OR PIRATE.

WHAT DOES THAT INDICATE TO YOU?

A WELL, I THINK – I THINK ONE THING I FOUND OUT ABOUT TED IS HE LIVES A LOT OF HIS LIFE IN FANTASY, A GREAT DEAL OF HIS LIFE IN FANTASY. I GAVE HIM THE INKBLOT TEST. AND THE INKBLOT TEST IS INTERESTING BECAUSE YOU HAND A PERSON A SILLY THING LIKE AN INKBLOT. YOU COULD TAKE THEM OUT TO LOOK AT CLOUDS, BUT CLOUDS DON'T STAY STILL, AND YOU CAN'T ALWAYS BE GUARANTEED THAT YOU'VE GOT CLOUDS; SO WE USE AN INKBLOT. WE HAND THEM AN INKBLOT. IT'S AN INKBLOT THAT'S BEEN USED SINCE 1921; SO WE KNOW KIND OF HOW PEOPLE ARE GOING TO REACT WHEN THEY LOOK AT THESE TEN DIFFERENT INKBLOTS.

TED'S APPROACH TO THE TEST SUGGESTED HE USES A TREMENDOUS AMOUNT OF FANTASY, MEETS HIS NEEDS THROUGH FANTASY. THERE'S A LOT OF FANTASY IN HIS – IN HIS LIFE. HE'S BEEN IN PRISON A GOOD BIT OF HIS LIFE AND PROBABLY SURVIVED BY RESORTING TO USING FANTASY RATHER THAN TO DEAL WITH THE REALITY. IT'S NOT THAT HE DOESN'T RECOGNIZE HIS FANTASY, BUT THIS IS HIS WAY OF PASSING THE TIME. AND I THINK THAT COULD HAVE SOMETHING TO DO WITH – WITH HIS [811] STATEMENTS, VERY DEFINITELY.

Q WELL, DO YOU THINK THAT COULD HAVE SOMETHING TO DO WITH BEING INSTITUTIONALIZED SINCE HE WAS SIXTEEN?

A SURE. SURE. HE'S HAD TO FIND SOME WAY TO SURVIVE. HE'S BEEN INSTITUTIONALIZED. HE'S HAD TO FIND A WAY TO FIND SOME INTEREST IN

LIFE. IT'S NOT VERY INTERESTING, APPARENTLY, SITTING IN A CELL ALL DAY.

Q DOES THE – WHAT YOU JUST DESCRIBED ABOUT THE STATEMENT THAT I GAVE YOU, THE MODERN-DAY VIKING, PIRATE, IS THAT ANY INDICATION OF WHAT THE FUTURE WOULD HOLD IN MR. COLE'S CASE?

A OH, MAYBE FUTURE FANTASIES.

Q BUT AS TO ACTUALLY FULFILLING THAT FANTASY?

A I DON'T THINK HE'D HAVE THE WHEREWITHAL TO FULFILL THAT KIND OF FANTASY, NO. I THINK THAT'S – THAT'S A FANTASY.

Q WELL, IT SOUNDS LIKE YOU KNOW TED PRETTY WELL, PROBABLY BETTER THAN TED HIMSELF.

A I THINK I KNOW TED VERY WELL. I SPENT A GREAT DEAL OF TIME WITH HIM, EIGHT HOURS OF INDIVIDUAL CONVERSATION, A LOT OF TESTING, A LOT OF VISITS AT DIFFERENT TIMES OF THE DAY. I WENT TO VISIT HIM IN THE MORNING TO SEE HOW HE IS WHEN HE GETS UP, TO SEE IF THIS IS CONSISTENT WITH SOME CHARACTERISTICS OF INDIVIDUALS WITH NEUROLOGICAL PROBLEMS. AND INDEED, HE'S – HE'S QUITE IRRITABLE WHEN HE WAKES UP IN THE MORNING. I WENT TO VISIT HIM LATER IN THE EVENING [812] TO SEE HOW HE IS AFTER HE'S BEEN UP AWHILE; GET IDEAS OF HOW HE IS FROM WEEK TO WEEK, WHAT KIND OF CONSISTENCY IS IN HIS PERSONALITY. WE'D TALK A GOOD BIT OF TIME EACH OF THESE VISITS, AND

THEN WE'D DO SOME TESTS, AND THEN WE'D TALK, AND THEN WE'D DO SOME TESTS.

SO I THINK IF WE CONSIDER HOW LITTLE TED KNOWS ABOUT HISSELF, I THINK YOU'RE RIGHT. I DO KNOW TED BETTER THAN HE KNOWS HIMSELF, BECAUSE HE'S NOT ACCESSIBLE TO HIMSELF. MUCH OF HIS PAST – MUCH OF HIS LIFE HE DOESN'T HAVE AS – THAT'S BEEN – IT'S BEEN SO PAINFUL THAT HE'S SUPPRESSED IT. IT'S NOT THERE.

Q HOW WOULD YOU SUM HIM UP TODAY?

A CONSIDERING HIS – HE'S BRIGHT, VERY BRIGHT, SIZZLING BRIGHT. HE'S EXTREMELY DEPRESSED TODAY. I THINK THE DEPRESSION HAS PROBABLY BEEN THERE A LONG TIME IN HIS LIFE. I THINK THAT THE RAW MATERIAL THAT HE STARTED WITH IS FANTASTIC RAW MATERIAL. JUST THE – AN ORDINARY FAMILY WOULD BE DELIGHTED TO HAVE A BABY COME INTO THE FAMILY WITH HIS KIND OF RAW MATERIAL. AND I'M GOING TO USE MY ANALOGY A BIT FURTHER OF RAW MATERIAL. THE MANUFACTURING PROCESS IS BOTCHED THE RAW MATERIAL HORRIBLY. IT'S GOOD RAW MATERIAL, BUT IT'S BEEN VERY DAMAGED.

Q WHAT IS YOUR OPINION AS TO FUTURE DANGEROUSNESS SIX, TEN, TWELVE, TWENTY YEARS FROM NOW?

A I THINK IF TED WERE RELEASED TODAY ON THE STREET, THERE'S [813] A MUCH GREATER PROBABILITY OF DANGEROUS BEHAVIOR THAN WITH THE REST OF US. WE CAN ONLY TALK IN PROBABILITIES. WE CAN'T TALK IN CERTAINTIES BECAUSE WE DON'T HAVE CRYSTAL BALLS. BUT I THINK THERE'S A PROBABILITY THAT ALL OF US ARE LIKELY TO ENGAGE IN DANGEROUS BEHAVIOR OR IN VIOLENT BEHAVIOR. IT'S NOT GOING TO BE THE SAME FOR ALL OF US. I THINK FOR TED IT'S GOING TO BE MUCH GREATER THAN FOR MOST INDIVIDUALS RIGHT NOW. SO I THINK THERE'S A POSSIBILITY OF FUTURE VIOLENCE. I DON'T THINK THERE'S ANY WAY WE – I THINK WE'D BE FOOLISH TO SAY OTHERWISE. I THINK WE'RE LOOKING AT YEARS FROM NOW.

THE RESEARCH ON INDIVIDUALS WHO BEHAVE THIS WAY – AND I CITED THOSE TWO EXAMPLES I'M FAMILIAR WITH, THE SPECIFIC STUDIES THAT HAVE BEEN DONE, BECAUSE THEY'RE ALL PRETTY MUCH SUMMARIZED AND ANALYZED IN THOSE STUDIES THAT I CITED. BUT I THINK AS WE SEE HIM AGE, GET OLDER, HORMONES CHANGE, THE PROCESS OF AGING TAKES OVER, AS IT DOES IN ALL OF US – AND WE ALL CHANGE. I THINK THE EVIDENCE IS OVERWHELMING THERE THAT INDIVIDUALS WHO HAVE BEHAVED AS HE HAS CHANGE. THEY BURN OUT. AND I THINK THERE'S A GOOD CHANCE OF LATER IN LIFE – NOT NOW, BUT LATER IN LIFE – SOME CHANGES.

Q ALL RIGHT. IS – KNOWING THAT TED HAS LIVED SO MANY YEARS IN PRISON AND WHAT I CALLED "INSTITUTIONALIZED" AWHILE AGO, DOES

HE REALLY KNOW ANY OTHER ROUTINE OR LIFE OTHER [814] THAN A – JUST A STRAIGHT DISCIPLINE TYPE REGIME?

A NO, I THINK THE – I DON'T THINK HE'S HAD A CHANCE AS AN ADULT TO DEVELOP ANY OTHER KIND OF LIFE BUT A ROUTINE, DISCIPLINED, HIGHLY-STRUCTURED KIND OF LIFE.

MR. SPENCE: PASS THE WITNESS, YOUR HONOR.

THE COURT: DO YOU HAVE ANY QUESTIONS?

MR. ALCALA: APPROACH THE WITNESS, YOUR HONOR?

THE COURT: YOU MAY.

CROSS EXAMINATION

BY MR. ALCALA:

Q DR. WRIGHT, WHAT WAS THE NAME OF THE TEST THAT YOU USED WHERE HE TOUCHED AN OBJECT AND YOU GAUGED HIS FEELINGS ABOUT IT? WHAT WAS THE NAME OF THAT AGAIN?

A THIS IS THE HAPTIC VISUAL DISCRIMINATION TEST, WHERE HE TOUCHES AN OBJECT AND YOU SEE WHETHER HE CAN RECOGNIZE THAT OBJECT.

Q DID YOU GIVE HIM ANY OBJECT TO TOUCH THAT IS SIMILAR TO THE FIBER SUCH AS I PLACE BEFORE YOU, STATE'S EXHIBIT NUMBER 21?

A SURE. THE FIBER IN THIS? NOT IDENTICAL, BUT THERE WERE SOME OBJECTS THAT WERE USED, SAIL CLOTH, TERRY-CLOTH, THESE KINDS OF THINGS.

Q WHAT DID HE RESPOND WHEN YOU HAD HIM TOUCH THOSE – THAT [815] TYPE OF FABRIC?

A I CAN GET THE TEST AND TELL YOU IN A SECOND. LET'S SEE ... TOUCHING DIFFERENT FABRICS – ACTUALLY, THIS IS A SPOOL WITH FABRIC TAPED ON THE OUTSIDE. THE INDIVIDUAL HOLDS THEIR HAND THROUGH A SCREEN, AS I SAID. THEY CAN'T SEE IT. AND THEY FEEL THE FABRIC, AND THEN THEY POINT TO A PICTURE OR TELL YOU THE NUMBER BENEATH THE PICTURE OF FIVE DIFFERENT ITEMS –

THE COURT: EXCUSE ME –

THE WITNESS: – WHICH ONE OF THESE IT IS.

THE COURT: – JUST A SECOND. EXCUSE ME.

MR. BAILIFF, IF THEY'RE MOWING THE LAWN OUT THERE, YOU CAN TELL THEM THEY CAN COME BACK LATER. WHATEVER THAT IS, TELL THEM TO TURN IT OFF.

THE WITNESS: THERE ARE FIVE DIFFERENT ITEMS. AND ON THAT, HE DIDN'T DO WELL AT ALL. IN FACT –

BY MR. ALCALA:

Q WHAT DO YOU MEAN, "HE DIDN'T DO WELL AT ALL"?

A WELL, HIS SCORE WITH HIS LEFT HAND WAS A – A STANDARD SCORE OF SIX. AVERAGE IS TEN. PROBABLY NINETY TO NINETY-FIVE PERCENT OF THE POPULATION DOES BETTER. ON HIS RIGHT HAND IT WAS AN EIGHT, AND THE AVERAGE IS TEN. PROBABLY SEVENTY PERCENT OF THE POPULATION DOES BETTER. [816] THE POPULATION I'M TALKING ABOUT IS THE GENERAL PERSON ON THE STREET WHO TAKES THE SAME TEST – CAN USUALLY DO BETTER TOUCHING THESE ITEMS AND IDENTIFYING CORRECTLY WHICH IS THE ITEM THEY'VE GOT IN THEIR HAND.

Q AND THOSE SCORES ARE DETERMINED BY WHAT HE TELLS YOU ABOUT WHAT HE TOUCHES; IS THAT CORRECT?

A IT'S BY – DETERMINED BY WHETHER HE CAN CORRECTLY IDENTIFY THE OBJECT, THE PICTURE OF THE OBJECT THAT HE'S TOUCHING.

Q OH, OKAY. NOW, ARE YOU – YOU'RE NOT A MEDICAL DOCTOR; IS THAT CORRECT?

A I'M NOT. I'M A PSYCHOLOGIST.

Q DOES THE CENTRAL NERVOUS SYSTEM HAVE SOMETHING TO DO WITH MATTERS RELATED TO PHYSIOLOGICAL MATTERS?

A IT DOES. WE'RE TALKING ABOUT CENTRAL NERVOUS SYSTEM DYSFUNCTION. I DON'T KNOW

WHETHER THERE'S DAMAGE OR NOT. LIKE I SAY, THAT MAY HAVE TO BE DETERMINED IN CASES ON A – THE ONLY WAY WE CAN DETERMINE THAT SOMETIMES IS A POST-MORTEM EXAMINATION, WHETHER THERE'S DAMAGE, BECAUSE IT DOESN'T SHOW UP IN PICTURES AND THAT SORT OF THING; AND IT'S INSIDE THE HEAD AND REAL HARD TO LOOK AT. "DYSFUNCTION" IS ALL WE CAN TALK ABOUT. IT'S NOT WORKING.

Q NOW, HAVE YOU EVER KNOWN OF PEOPLE WHO ARE PEDOPHILES OR PEOPLE WHO LIKE TO HAVE SEX – SEXUAL ENCOUNTERS WITH CHILDREN? WOULD THAT BE CORRECT, PEDOPHILES; THEY LIKE TO HAVE –

[817] A PEDOPHILES ARE THE –

Q – SEXUAL ENCOUNTERS WITH CHILDREN?

A – ONES WITH CHILDREN, YES.

Q ALL RIGHT. HAVE YOU EVER SEEN THEM IN – WHEN THEY'RE ABOVE THE AGE OF FORTY, IN THEIR FIFTIES?

A YES.

Q SO IT'S POSSIBLE, ISN'T THAT CORRECT, THAT THEIR HORMONES WOULDN'T CHANGE AS YOU SUGGESTED EARLIER?

A I'M NOT SUGGESTING HORMONES CHANGE. I'M SUGGESTING THAT, AS WE GROW OLDER, WE CHANGE; THE COMPASS POINTS A DIFFERENT DIRECTION. WE'RE TIRED. WE'RE – WE'RE – OUR GOALS, OUR ORIENTATION IS DIFFERENT. THE

RESEARCH INDICATES THAT – THAT THIS IS THE CASE WITH INDIVIDUALS WHO COMMIT VIOLENT OR ANTISOCIAL ACTS.

Q ARE YOU SAYING THAT – SIR, THAT THE GENERAL PUBLIC, PEOPLE, JUST ANY CITIZEN, DO NOT EVER IN THEIR LIFE EXPERIENCE PAINS WHEN THEY'RE GROWING UP?

A EVERY ONE OF US DO.

Q AND ISN'T IT TRUE THAT DIFFERENT OF US REACT DIFFERENTLY AND DEAL WITH OUR PAINS DIFFERENTLY? ISN'T THAT CORRECT?

A THAT'S RIGHT.

Q AND IN THIS CASE, THIS INDIVIDUAL DEALT WITH PAIN BY KILLING ONE PERSON WHEN HE WAS SIXTEEN AND THEN ANOTHER PERSON WHEN HE WAS THIRTY. IS THAT THE WAY HE DEALT WITH PAIN?

[818] A. I'M NOT SURE WHY THOSE THINGS HAPPENED.

Q OKAY. ISN'T THAT A FACT THAT HE DID THAT, SIR?

A AS I UNDERSTAND. I DIDN'T SEE THAT HAPPEN; BUT AS I UNDERSTAND, THOSE WERE DETERMINED THROUGH DUE PROCESS; AND SO, THEN, THEY'RE FACTS.

Q ARE YOU FAMILIAR WITH HIS BACKGROUND? HAVE YOU BEEN ADVISED OF HIS BACKGROUND, THAT HE'S BEEN CONVICTED OF MURDER WHEN HE WAS SIXTEEN?

A I'VE BEEN ADVISED OF THAT, YES.

Q HAVE YOU BEEN ADVISED THAT HE WAS CONVICTED OF AGGRAVATED SEXUAL ABUSE IN DALLAS COUNTY, TEXAS?

A I HAVE.

Q OKAY. WELL, WAS – DO YOU THINK HE WAS DEALING WITH HIS PAIN WHEN HE COMMITTED THAT AGGRAVATED SEXUAL ABUSE ON THOSE CHILDREN BACK IN 1981, '82?

A WHETHER HE WAS DEALING WITH HIS PAIN, WHAT HE WAS DEALING WITH, I'M NOT SURE.

Q OKAY. NOW, DID I – DID I HEAR YOU CORRECT TO SAY THAT ALL OF US COMMIT DANGEROUS ACTS?

A NO. I SAID, ALL OF US – THERE IS A – ALL OF US – THERE'S A POSSIBILITY THAT ANY OF US IN THE RIGHT CIRCUMSTANCES COULD DO SOMETHING DANGEROUS OR ANTISOCIAL OR VIOLENT.

Q GIVEN THE DEFENDANT'S BACKGROUND, DO YOU THINK IT'S MORE PROBABLE THAT HE WOULD COMMIT THOSE ACTS?

[819] A. ABSOLUTELY.

Q YOU HAVE NO PROBLEM WITH THAT, DO YOU?

A NO, NO PROBLEM WITH THAT.

Q OKAY. DO YOU – KNOWING HIM AS YOU SAY YOU DO – AND YOU TESTIFIED YOU KNOW HIM PROBABLY BETTER THAN HE KNOWS HIMSELF –

A I THINK SO.

Q – DO YOU FEEL HE'S A DANGEROUS PERSON?

A YES.

Q OKAY. AND ISN'T IT A FACT THAT THERE'S A PROBABILITY THAT HE WOULD COMMIT CRIMINAL ACTS OF VIOLENCE THAT WOULD CONSTITUTE A CONTINUING THREAT TO SOCIETY IN THE FUTURE? ISN'T THAT CORRECT?

A I THINK THAT PROBABILITY IS STRONGER THAN FOR THE REST OF US, YES.

Q YOU SAID HE FINDS INTERESTS – FINDS HIS INTEREST IN LIFE THROUGH THESE FANTASIES. DO YOU THINK HE WAS ENGAGED IN A FANTASY WHEN HE WAS COMMITTING THE MURDER OF MR. RAYMOND C. RICHARDSON?

A WELL, THAT WAS APPARENTLY REALITY.

Q OKAY. AT WHAT POINT DOES HE GO – GET INTO FANTASY AND AT WHAT POINT DOES HE GET INTO REALITY?

A OH, I DON'T – I DON'T THINK IT'S A PROBLEM OF BEING UNABLE TO DISTINGUISH FANTASY FROM REALITY. I THINK THAT'S IMPORTANT THAT IT BE CLEAR. I THINK HE MEETS MANY [820] OF HIS NEEDS THROUGH FANTASY. AND I THINK THAT WRITING IN HIS DIARY ABOUT BEING A PIRATE AND ALL THESE KINDS OF THINGS – I THINK THAT'S A FANTASY OF HIS. I DON'T THINK THAT'S A –

Q HE'S – HE –

A – REALITY.

Q HE'S AN INTELLIGENT PERSON; IS THAT CORRECT?

A VERY INTELLIGENT.

Q OKAY. AND HE'S THIRTY YEARS OLD; IS THAT CORRECT?

A THAT'S CORRECT. NO, I THINK HE'S – HIS DATE OF BIRTH IS JULY 27, 1956. I BELIEVE THAT MAKES HIM THIRTY-ONE.

Q OKAY. NOW, IN VIEW – IF YOU KNOW HIS BACKGROUND, THAT HE HAS BEEN CONVICTED OF MURDER BEFORE, HE'S BEEN CONVICTED OF AGGRAVATED SEXUAL ABUSE, AND NOW KNOW THAT HE'S BEEN CONVICTED OF CAPITAL MURDER IN THIS PARTICULAR CASE, AND YOU READ IN HIS DIARY THAT HE WANTS TO GO OUT AND RAPE, PILLAGE AND MURDER, DOES THAT PARTICULAR SENTENCE THERE IN THAT PASSAGE IN THE DIARY GIVE YOU – ARE YOU STILL SAYING THAT HE'S LIVING IN A FANTASY?

A I THINK HE'S WRITING IN A FANTASY WHEN HE WRITES THAT.

Q OKAY. BUT INDEED HE'S LIVED THOSE THINGS, HAS HE NOT?

A HE'S NEVER BEEN A PIRATE.

Q OKAY.

A HE'S –

Q IN THE SENSE OF A PIRATE BEING SOMEONE WHO TAKES THAT [821] WHICH IS NOT HIS, EITHER LIFE OR PROPERTY –

A INDEED HE HAS.

Q – INDEED HE HAS LIVED THAT, HAS HE NOT?

A THAT'S BEEN DETERMINED BY DUE PROCESS, YES.

Q OKAY. HOW DID YOU COME UP WITH THE AGE OF A PERSON CHANGING BEING AT THE AGE OF FORTY-FIVE AND, IN PARTICULAR, THIS DEFENDANT?

A PARDON? YOUR LAST QUESTION . . . ?

Q IN PARTICULAR THIS DEFENDANT?

A THOSE STATISTICS, I'M NOT – I'M NOT CERTAIN OF THE F.B.I.'S SOURCE OF THOSE STATISTICS. IT'S – I CAN CITE IT. IT'S THE . . . SOMEWHERE HERE I'VE GOT THAT. THE – IT'S REFLECTED IN THE F.B.I. CRIME STATISTICS. I'VE SEEN THOSE STATISTICS, BUT I CAN'T QUOTE YOU EXACTLY THE SOURCE.

QUOTING MAINLY LYONS' BOOK, "CHARACTER DISORDERS," 1982. THAT'S MY MAIN SOURCE FOR SAYING THAT THE RESEARCH OVERWHELMINGLY INDICATES THAT THIS HAPPENS TO INDIVIDUALS WHO HAVE BEHAVED IN THIS WAY.

WE'RE TALKING AGAIN IN PROBABILITIES. TED HAS A GREATER PROBABILITY THAN THE REST OF

US OF DOING SOMETHING VIOLENT IF HE'S TURNED LOOSE RIGHT NOW.

Q OKAY.

A WE ALSO KNOW FROM PROBABILITIES THAT, AS PEOPLE GROW OLDER, THE PROBABILITY OF THEM BECOMING INVOLVED IN [822] VIOLENT ACTS DECREASES TO THE POINT OF FIFTY, WHERE THE F.B.I. STATISTICS WOULD INDICATE THAT THEY'RE ALMOST – IT ALMOST DOESN'T HAPPEN. THESE BEHAVIORS HAVE ALMOST BURNED OUT OF INDIVIDUALS. WHILE THEY MAY BE FLAMING WHILE THEY'RE YOUNGER, THEY BURN OUT LATER. SO I DON'T HAVE ANY SPECIFIC STATEMENTS FOR TED AS AN INDIVIDUAL. THAT WOULD TAKE A CRYSTAL BALL. BUT FOR TED AS A – AS A HUMAN BEING, WE KNOW THIS HAPPENS TO HUMAN BEINGS WHO ARE LIKE TED, WHO HAVE HISTORIES LIKE TED. WE KNOW FROM STATISTICS THAT THEY CHANGE, AS WE DO ALL CHANGE.

Q OKAY. BUT THESE ARE – THESE MATTERS ARE JUST BASED ON STATISTICS AND POSSIBILITIES; IS THAT CORRECT?

A IT'S THE SAME WAY THAT WE'RE PREDICTING OR THAT WE'RE SAYING THE PROBABILITY OR POSSIBILITY OF FUTURE DANGEROUSNESS. IT'S BASED ON STATISTICS.

Q BASED ON – BASED ON A – ON PRIOR EXPERIENCE, YOU CAN –

A PRIOR EXPERIENCE.

Q – PRETTY MUCH TELL WHAT'S GOING TO HAPPEN; IS THAT CORRECT?

A ONE OF THE BEST PREDICTORS OF FUTURE BEHAVIOR IS PAST BEHAVIOR. ANOTHER GREAT PREDICTOR OF FUTURE BEHAVIOR IS THE BEHAVIOR THAT WE FIND IN NOMOTHETIC, OR NORMS, OR IN – THAT'S A BIG WORD TO MEAN IT TAKES A WHOLE – WHOLE PART OF SOCIETY AND SEES WHAT HAPPENS TO INDIVIDUALS LIKE THIS AS THEY GROW OLDER.

[823] Q. AND IT'S VERY PROBABLE THAT IF A PERSON HAS COMMITTED TWO MURDERS AND SEXUALLY ABUSED CHILDREN, THAT HE'S GOING TO – IT'S PROBABLE THAT HE'S GOING TO CONTINUE DOING THAT; ISN'T THAT CORRECT, SIR? THERE'S A GREATER PROBABILITY THAT HE'S GOING TO CONTINUE THAT; IS THAT CORRECT?

A HE WOULD – YES, THERE WOULD BE A GREATER PROBABILITY. NOT A VERY PROBABLE, BUT THERE WOULD BE A – THERE WOULD BE A GREATER LIKELINESS THAN WITH THOSE OF US IN THE NORMAL POPULATION.

Q WHY DO YOU SAY IT'S NOT VERY PROBABLE THAT HE WOULD CONTINUE THAT LIFESTYLE?

A I SAID – YOU SAID, "THERE'S A GREATER PROBABILITY."

Q IS THERE NOT A GREATER PROBABILITY?

A YOU SAID, "A VERY [SIC] GREATER PROBABILITY," AND I SAID THERE IS A GREATER PROBABILITY. I'M NOT SURE HOW GREAT.

Q OKAY. HE KNOWS RIGHT FROM WRONG, DOES HE NOT?

A NO DOUBT.

Q WOULD IT BE UNUSUAL FOR A PERSON THAT'S STANDING TRIAL FOR CAPITAL MURDER WOULD BE DEPRESSED?

A BE VERY UNUSUAL FOR THEM NOT TO BE DEPRESSED.

Q SO THAT WHEN YOU SAY THAT WHEN YOU SAW HIM – WHEN YOU SAW HIM TODAY, APPARENTLY WHEN YOU SAW HIM WHEN HE TRIED TO ATTEMPT SUICIDE, IF HE'D BEEN DEPRESSED, THAT'S NOT UNUSUAL, IS IT?

A IT'S UNUSUAL IN THE LENGTH OF TIME HE'S BEEN DEPRESSED. [824] I THINK HE'S BEEN DEPRESSED ALL HIS LIFE. I THINK HE'S BEEN CHRONICALLY DEPRESSED. HE HAS TERRIFIC NEEDS FOR NURTURANCE. HE'LL TAKE THE SHORT BRIDGE ANY TIME AND GO FOR NURTURANCE. IF SOMEBODY WHO'S NON-THREATENING TO HIM PROMISES THAT THEY CAN BE NURTURING TO HIM – AND BY "NURTURING," I'M TALKING ABOUT THEY CAN GIVE HIM SOME KIND OF WARMTH, SOME KIND OF ACCEPTANCE, SOME KIND OF FEELING THAT HE'S ALREADY – HE'S NEVER FELT LOVED AND WORTHWHILE IN HIS LIFE. HE'LL GRAB AT ANY SCRAP. HE'LL SCRAPE FOR FEELING LOVED AND WORTHWHILE. SO . . .

Q IF IT WERE THE TYPE OF NURTURING – IF YOU WOULD ASSUME, JUST FOR THE PURPOSE OF THE QUESTION, THAT A SIXTY-SIX-YEAR-OLD MAN

TOOK HIM IN AS A FRIEND, ALLOWED HIM IN HIS HOME, TALKED TO HIM – WOULD THAT BE THE TYPE OF NURTURING THAT HE WOULD NEED, PART OF IT?

A OH, YEAH. SURE. HE'D NEED THAT.

MR. ALCALA: I'LL PASS THE WITNESS, YOUR HONOR.

REDIRECT EXAMINATION

BY MR. SPENCE:

Q GETTING BACK TO THE NEED TO NURTURE, DR. WRIGHT, KELLY HICKEY, WHO IS MR. COLE'S SISTER – OR HALF-SISTER-IN-LAW – IF SHE WERE TO SHOW HIM FEELINGS OF LOVE OR TREAT HIM LIKE A MAN, SHOW SOME EMOTION TOWARDS HIM, IS HE THE TYPE [825] OF PERSON THAT WOULD DROP EVERYTHING AND GO WITH HER?

A I THINK SO, PROBABLY.

Q OKAY.

A HE'S HUNGRY FOR THAT SORT OF THING.

Q OKAY. FOR SOMETHING HE'S NEVER HAD ALL HIS LIFE?

A I DON'T THINK HE HAS.

Q WHAT IS A "SOCIOPATH"?

A I DON'T KNOW. AND I – I DON'T KNOW BECAUSE IT'S NOT – THAT'S A – "SOCIOPATH" IS A – IS A COLLOQUIAL WORD. IT'S A POPULAR WORD. IT'S NOT A SCIENTIFIC WORD. SOCIOPATH – I'VE HEARD

BUSINESSMEN CALLED "SOCIOPATHS" BECAUSE THEY'RE VERY SHREWD, CAR DEALERS CALLED A "SOCIOPATH" BECAUSE MAYBE THEY PLAY THE USED CAR UP AS BEING A LITTLE BIT BETTER THAN IT IS. I DON'T – THERE'S NOT A – THAT'S NOT IN THE VOCABULARY OF MY PROFESSION. IT'S – IT'S A WORD THAT I HAVE CERTAINLY HEARD. IT'S A WORD THAT – WHEN SOMEBODY PULLS IN FRONT OF ME ON THE FREEWAY, I MIGHT SCREAM "SOCIOPATH" AT THEM FOR A – ESPECIALLY IF THERE'S SOMEONE IN THE BACK SEAT I WOULDN'T WANT TO HEAR ANOTHER KIND OF WORD, BUT I DON'T – AS FAR AS WHAT IT IS SCIENTIFICALLY, I DON'T KNOW. IT'S NOT A SCIENTIFIC WORD.

MR. SPENCE: OKAY. I HAVE NO FURTHER QUESTIONS, YOUR HONOR.

[826] MR. ALCALA: NOTHING FURTHER, YOUR HONOR.

THE COURT: STEP DOWN.

* * *

[828] THE COURT: BE SEATED, SIR.

MR. WENDELL DICKERSON: THANK YOU.

THEREUPON,

WENDEL L. [sic] DICKERSON, Ph.D.,

WAS CALLED AS A WITNESS ON BEHALF OF THE DEFENDANT AND, HAVING BEEN FIRST DULY SWORN, TESTIFIED AS FOLLOWS, TO-WIT:

DIRECT EXAMINATION

BY MR. SPENCE:

Q WOULD YOU STATE YOUR NAME FOR THE RECORD, SIR?

A MY NAME IS "WENDEL L. DICKERSON."

Q OKAY: WOULD YOU TELL US SOMETHING ABOUT YOUR EDUCATIONAL BACKGROUND, SIR?

A I HAVE BACHELOR'S AND MASTER'S DEGREES FROM NORTH TEXAS STATE UP IN DENTON, AND I HOLD A DOCTORAL DEGREE FROM THE UNIVERSITY OF TEXAS IN AUSTIN.

Q SO YOU HAVE A DOCTORATE OF PSYCHOLOGY?

A YES, I DO.

Q ARE YOU THE HOLDER OF ANY CERTIFICATES OR LICENSE, SIR?

A YES. I'M LICENSED BY THE STATE BOARD OF EXAMINERS OF THE STATE OF TEXAS.

Q OKAY. WOULD YOU TELL US SOMETHING ABOUT YOUR EMPLOYMENT?

A I HAVE BEEN WORKING AS A PSYCHOLOGIST PROFESSIONALLY SINCE 1960; SO I GUESS I'M COMING UP ON TWENTY-EIGHT YEARS HERE [829] IN A FEW DAYS. I BEGAN THAT IN SOME OF THE STATE MENTAL INSTITUTIONS IN AUSTIN. BEEN ON THE FACULTY OF SEVERAL UNIVERSITIES, INCLUDING THE UNIVERSITY OF TEXAS, THE UNIVERSITY OF FLORIDA, COLORADO STATE, AND

STEPHEN F. AUSTIN. I WAS THE CHIEF PSYCHOLOGIST AND MENTAL HEALTH OFFICER FOR THE TEXAS DEPARTMENT OF CORRECTIONS FOR A TIME. AND I'M IN PRIVATE PRACTICE.

Q ARE YOU THE HOLDER OF ANY HONORS OR AWARDS?

A OH, I HAVE BEEN LISTED IN SOME OF THOSE "WHO'S WHO," YOU KNOW, LEADERS IN THIS AND THAT AND ONE THING AND ANOTHER. I DON'T KNOW THAT THAT HELPS US THAT MUCH, MR. SPENCE –

Q HAVE YOU DONE ANY –

A – EXCEPT TO TAKE UP THESE FOLKS' TIME ON THEIR SATURDAY AFTERNOON.

Q I UNDERSTAND THAT.

HAVE YOU DONE ANY PUBLISHING? HAVE YOU WRITTEN –

A YES.

Q – ARTICLES?

A I HAVE WRITTEN – I HAVE SOMEWHERE BETWEEN FORTY-FIVE AND FIFTY ARTICLES.

Q NOW, I BELIEVE THAT YOU SAID THAT YOU WERE TEACHING PEOPLE AT ONE TIME AT TEXAS DEPARTMENT OF CORRECTIONS.

A YES. THAT'S CORRECT.

Q WHAT DID YOU DO THERE, SIR?

A I WAS THE CHIEF MENTAL HEALTH OFFICER FOR THE WHOLE SYSTEM [830] THERE. THAT INCLUDED OUR PSYCHIATRIC UNIT AND DRUG ABUSE PROGRAMS AND FORENSIC SERVICES AND WHATEVER CAME DOWN THE PIKE THAT NEEDED TO BE DONE THERE WITHIN THE DEPARTMENT – WAS IN MY DEPARTMENT.

Q DID YOU EVER SEE ANY DEATH ROW INMATES OR WORK WITH ANY DEATH ROW INMATES?

A YES.

Q HOW MANY WOULD YOU SAY, SIR?

A I THINK WHEN I LEFT THERE, WE HAD SIXTY-SOME-ODD ON DEATH ROW.

Q DID YOU EVER PARTICIPATE IN ANY DECISIONS TO EXECUTE ONE?

A YEAH. PART OF MY JOB THERE WAS TO GO EXAMINE THEM PRE-EXECUTION AND SEE IF THEY WERE FIT TO KILL. WE HAD A NUMBER COME VERY CLOSE; THOUGH, FORTUNATELY – OR UNFORTUNATELY, DEPENDING ON YOUR POINT OF VIEW – STAYS WERE FORTHCOMING ON EACH OF THOSE. BUT, YES, WE HAD ABOUT A DOZEN THAT I SO EXAMINED.

Q WELL, THEN I WOULD SAY – ARE YOU FAMILIAR WITH THE TEXAS DEATH STATUTE, THEN?

A YES, I'M QUITE FAMILIAR WITH THE TEXAS DEATH STATUTE.

Q OKAY. AND YOU ARE AWARE THAT THERE'S SOME SPECIAL ISSUES?

A YES, SIR.

Q OKAY. I BELIEVE SPECIAL ISSUE NUMBER 2 IS THE PROBABILITY OR POSSIBILITY OF FUTURE DANGEROUSNESS. YOU'RE AWARE OF THAT ONE?

[831] A YES.

Q AND YOU'RE FAMILIAR WITH IT?

A I'M FAMILIAR WITH IT.

Q OKAY. WOULD YOU EXPLAIN WHAT'S INVOLVED IN PREDICTING FUTURE BEHAVIOR AND FUTURE VIOLENT CONDUCT IN PARTICULAR?

A WELL, MR. SPENCE, MY – I'LL TRY TO NOT MAKE MY ANSWER TO YOUR QUESTION UNNECESSARILY LENGTHY, BECAUSE I CAN – I CAN APPRECIATE THAT THE EARS CAN UNDERSTAND ONLY WHAT THE BOTTOM CAN ENDURE. BUT I –

THE COURT: JUST ANSWER THE QUESTION, SIR.

THE WITNESS: YES, YOUR HONOR.

AND THERE ARE – THERE ARE TWO PARTS TO MY ANSWER TO YOUR QUESTION.

THE ISSUE OF PREDICTING BEHAVIOR GENERALLY, REGARDLESS OF THE KIND OF BEHAVIOR, AS MAY – THE FIRST THING YOU'VE GOT TO DO IS DECIDE PRECISELY WHAT BEHAVIOR YOU'RE TRYING TO PREDICT IN THE FUTURE, AND THAT NEEDS TO BE A REASONABLY PRECISE DEFINITION. THEN YOU HAVE TO TRY TO FIND WHAT THINGS ARE HISTORICALLY RELATED TO THAT AND FIND SOME

WAY OF COUNTING THAT AND RELATE THAT TO IT IN SOME KIND OF SIGNIFICANT WAY. THIS IS USUALLY DONE WITH A SERIES OF VERY COMPLEX MATHEMATICAL TECHNIQUES REFERRED TO AS "CORRELATIONAL PROCEDURES" OR SOMETHING LIKE THAT.

WE ALWAYS FIND WHEN WE'RE TRYING TO PREDICT ANY [832] PARTICULAR KIND OF BEHAVIOR THAT – THAT SOME THINGS WILL WORK TO PREDICT AND SOME THINGS WILL NOT. WE FIND THAT, AS A GENERAL PROPOSITION, OVER THE – THE LONGER TERM WE TRY TO MAKE PREDICTION OVER, THE LESS ACCURATE OUR PREDICTIONS TEND TO BE. AND IT DOESN'T MAKE TOO MUCH DIFFERENCE WHAT KIND OF BEHAVIOR WE'RE TALKING ABOUT, WHETHER IT BE SUCCESS IN SCHOOL OR CESSATION OF FINGER-BITING OR FIGHTER BOMBER TRAINING OR SOMETHING LIKE THAT. THINGS THAT PEOPLE DO VERY FREQUENTLY ARE GENERALLY MORE – OR THAT THEY ENGAGE IN WITH A HIGH DEGREE OF FREQUENCY TEND TO BE SOMEWHAT MORE PREDICTABLE THAN THINGS WHICH ARE LESS FREQUENT IN NATURE.

NOW, WITH RESPECT TO VIOLENT CONDUCT, IT AND OTHER KINDS OF BEHAVIOR WHICH ARE REFERRED TO AS "LOW BASE RATE BEHAVIORS" ARE TYPICALLY VERY HARD TO PREDICT, AND OUR LEVEL OF ACCURACY OF PREDICTION IS VERY – IS NOT VERY GOOD.

Q WHAT IS THE DIFFERENCE BETWEEN DIAGNOSING SOMEONE THAT'S DANGEROUS AND

THEIR ACTUAL BEHAVIOR? CAN YOU TELL WHAT'S ACTUALLY GOING TO HAPPEN?

A NOT VERY WELL. THERE'S BEEN A GREAT DEAL OF RESEARCH DONE ON TRYING TO PREDICT ACTUAL VIOLENT CONDUCT. AND WHENEVER WE DESCRIBE SOMEONE AS "DANGEROUS," WE'RE MAKING – WE'RE MAKING AN ATTRIBUTION TO THEM THAT – THAT THEY ARE AT GREATER RISK FOR VIOLENT CONDUCT THAN, SAY, A PERSON THAT [833] WE WOULD SAY IS "NONDANGEROUS."

WHENEVER WE ASSERT THAT SOMEONE IS DANGEROUS, WE'RE SAYING THAT HE'S MORE LIKELY TO ACTUALLY ACT OUT. HOWEVER, WHEN WE REACH THAT DIAGNOSIS – IT'S BEEN DEMONSTRATED IN STUDY AFTER STUDY THAT THAT DIAGNOSIS ACTUALLY LEADS TO – IS FOLLOWED BY VIOLENT CONDUCT ONLY ABOUT ONE IN THREE TIMES. SO YOU'RE WRONG – WHENEVER YOU SAY SOMEBODY IS DANGEROUS, SAY HE'S GOING TO DO SOMETHING VIOLENT OR AGGRESSIVE, YOU'RE GOING TO BE WRONG ABOUT TWICE AS OFTEN AS YOU'RE – AS YOU'RE RIGHT.

Q WELL, IN REGARD TO THE TEXAS DEATH STATUTE AND SPECIAL ISSUES, HAVE YOU EVER HEARD THE TERM "BURNOUT" USED IN REGARD TO A SITUATION LIKE THIS . . . PERTAINING TO A PERSON THAT HAS COMMITTED CRIMES WHEN HE WAS YOUNGER AND, WHEN HE GETS OLDER, HE GETS BURNED OUT?

A WELL, "BURNOUT" IS KIND OF A GENERIC – A BIG TERM, BUT, YEAH. IF I CAN TRY TO NARROW IT DOWN . . . MANY PEOPLE WHO ARE INVOLVED IN

CRIMES OF VARIOUS KINDS, PARTICULARLY CERTAIN KINDS OF VIOLENT CRIMES, WILL PRESENT A PARTICULAR – OR, YOU KNOW, SEVERAL DIFFERENT KINDS OF PSYCHOLOGICAL OR PSYCHIATRIC PICTURES THAT WILL – AND THE EXPERTS WILL GET TOGETHER AND ARGUE ABOUT THIS AND ARGUE ABOUT THAT, BUT WHAT – AND ARGUE ABOUT THE TREATABILITY OF THE CONDITION.

BUT WHAT IS VERY CLEAR FROM THE AVAILABLE DATA, A LOT [834] OF IT, FROM THE UNIFORM CRIME REPORTS THE F.B.I. PUBLISHES IS THAT VIOLENT CONDUCT IS PREDOMINANTLY, OVERWHELMINGLY THE PROVINCE OF THE YOUNG. YOUR HIGHEST INSTANCE OF VIOLENT CONDUCT IS IN ABOUT THE EIGHTEEN TO TWENTY-FIVE GROUP, AND THEN THERE IS A GRADUAL DIMUNITION [SIC] OF THE INCIDENTS OF VIOLENT CONDUCT AS TIME GOES – AS THE AGE GROUPS GET OLDER. BY THE TIME YOU GET THEM TO FORTY, IT BECOMES FAIRLY RARE; AND BY THE TIME THEY GET TO FIFTY, IT'S – IT'S REALLY RARE INDEED FOR A FIFTY-YEAR-OLD INDIVIDUAL TO BE INVOLVED IN SOME KIND OF VIOLENT OR AGGRESSIVE ACT. I MEAN, SURE, IT HAPPENS, BUT IT'S STATISTICALLY QUITE RARE.

Q HAVE YOU EVER SEEN TED COLE BEFORE TODAY, DR. DICKERSON?

A NO, SIR, I HAVE NOT.

Q HAVE YOU EVER EXAMINED HIM?

A NO, I HAVE NOT.

Q HAVE YOU LOOKED OVER DOCTOR – THE TESTS THAT DR. JARVIS WRIGHT GAVE MR. COLE?

A YES, SIR, I DID.

Q HAVE YOU DISCUSSED THOSE WITH HIM?

A BRIEFLY, YES, I HAVE.

Q HOW WELL DO THESE TESTS PREDICT FUTURE DANGEROUSNESS?

A REALLY, BASICALLY AT THE LEVEL I'VE ALREADY SAID, MR. SPENCE – I MEAN, I THINK CERTAINLY DR. WRIGHT DID A VERY THOROUGH JOB, AND HE HAS – I'M SURE, HAS A CONCLUSION [835] ABOUT THE SIGNIFICANCE OF THOSE TEST RESULTS. BUT WILL THEY PREDICT – WILL THEY – WILL THEY SAY BEYOND ANY SHADOW OF A DOUBT OR TO A CERTAIN LEVEL – I MEAN, THE LEVEL OF COMPETENCE HERE STILL DOES NOT EXCEED ONE IN THREE IF HE SAID THAT THE MAN IS DANGEROUS. BUT IF HE SAID THE MAN WAS NOT DANGEROUS, HOWEVER, HE WOULD BE RIGHT ABOUT – HE WOULD ONLY BE WRONG ABOUT SEVEN TIMES OUT OF HUNDRED THOUSAND. SO THEY DO A PRETTY GOOD DIRECTION – THEY DO A GOOD JOB IN ONE DIRECTION AND NOT SO GOOD A JOB IN THE OTHER DIRECTION.

Q ARE THERE ANY OTHER FORMS OF PSYCHIATRIC DIAGNOSIS WHICH WOULD CONFIRM FUTURE DANGEROUS CONDUCT?

A WELL, THERE – THERE ARE LOTS OF WAYS TO CONFIRM – OR, TO ASSESS THE FUTURE DANGEROUSNESS THINGS ... JUST SIT DOWN AND

TALK TO SOMEBODY; OR YOU CAN – YOU CAN ROLL DICE AND MAKE A GUESS, AS FAR AS THAT'S CONCERNED.

Q AND THAT'S ALL IT'S GOING TO BE, IS A GUESS?

A WELL, I THINK IT'S A LITTLE BETTER THAN A GUESS, BUT IT'S – BUT I'M TELLING –

Q AN EDUCATED GUESS.

A – YOU, YOU KNOW, WITH VERY – YOU KNOW, WITH – I HOPE, A FAIR DEGREE OF PRECISION WHAT THE ODDS ACTUALLY ARE BY ACTUAL EMPIRICAL RESEARCH. AND DR. WRIGHT'S TESTS OR ANY OTHER PSYCHIATRIC OR PSYCHOLOGICAL TESTS THAT CAN BE ADMINISTERED WILL NOT EXCEED THE ODDS THAT I'VE ALREADY [836] QUOTED. AND I KNOW THAT BECAUSE THERE – THEY – THERE HAVE BEEN REPEATED STUDIES THAT HAVE USED A VARIETY OF TECHNIQUES, A VARIETY OF PROCEDURES, AND ASKED LITERALLY HUNDREDS UPON HUNDREDS OF QUESTIONS, TRYING TO DETERMINE OR FIGURE OUT WHAT WOULD MORE RELIABLY PREDICT ACTUAL VIOLENT – FUTURE VIOLENT CONDUCT, AND – I MEAN, WE CAN – WE CAN ASK ALL THE QUESTIONS IN THE WORLD AND THROW EVERYTHING WE CAN FIND INTO THE POT, AND THAT'S STILL WHAT OUR ODDS ARE GOING TO BE.

Q WHAT DOES THE TERM "SOCIOPATH" MEAN TO YOU, DR. DICKERSON?

A WELL, IT'S KIND OF AN OUTDATED TERM, BUT "SOCIOPATH" IS A WORD THAT APPEARED IN

"DIAGNOSTIC STATISTICAL MANUAL II," REPLACING THE WORD "PSYCHOPATH," WHICH APPEARED IN "DIAGNOSTIC STASTICAL [sic] MANUAL I," THE AMERICAN PSYCHIATRIC ASSOCIATION. AND BASICALLY WHAT IT REFERS TO IS PEOPLE THAT BREAK THE LAW, THEY'RE NOT CRAZY, AND WE DON'T KNOW WHY. NOW, IT'S KIND OF A WASTEBASKET KIND OF DIAGNOSIS TO THE EXTENT IT'S A DIAGNOSIS AT ALL. IT'S JUST – IT'S A WORD THAT WE APPLY TO PEOPLE WHO ARE IN TROUBLE WITH THE LAW AS MUCH AS ANYTHING ELSE; BUT WE ALSO APPLY IT TO A LOT OF OTHER THINGS, CONDUCT THAT WE DON'T LIKE, WE THINK IS UNETHICAL OR IMMORAL IN SOME WAY.

BUT, THE SCIENTIFIC RESEARCH OR THE WORK THAT IS BEING DONE TRYING TO ELABORATE OR ILLUMINATE THIS CONCEPT – THE VERY EARLIEST LITERATURE ON THE SUBJECT WOULD REFER [837] TO MORAL IMBECILES, MORAL FOOLS. BY THE WAY, WOULD – THEY'RE TRYING TO – THEY WILL – A LOT OF WRITERS ARE BEGINNING TO DIFFERENTIATE BETWEEN SEVERAL POSSIBLE SUB-TYPES THAT ARE JUST NOT READILY APPARENT; ONE OF WHICH IS: WE'RE UNABLE TO COME UP WITH ANYTHING OTHER THAN IT SIMPLY PROBABLY ARISES CONSTITUTIONALLY AND AT A VERY EARLY AGE. AND THAT WILL BE EVIDENT FROM THE TIME THEY'RE FIVE OR SIX YEARS OLD. OTHERS WHO – WHOSE ANTISOCIAL TENDENCIES ARE NOT EVIDENT UNTIL THEY'RE THIRTEEN OR FOURTEEN. THERE'S CONSIDERABLE – THERE'S MOUNTING DEGREE OF RESEARCH THAT SUGGESTS THAT THIS IS – THAT

THIS MAY, IN FACT, BE A DISSOCIATIVE OR NEUROTIC KIND OF REACTION AND, THOUGH IT MAY SEEM TO BE THE SAME THING ON THE FACE OF IT, IT HAS A DIFFERENT KIND OF UNDERLYING CAUSE THAT – THAT PRODUCES THE SAME THING.

Q HOW DOES THE TEXAS DEPARTMENT OF CORRECTIONS TAKE CARE OF THESE TYPE OF PEOPLE, SOCIOPATHS OR ASSORTED VIOLENT BEHAVIOR TYPE PEOPLE?

A WELL, THEY LOCK THEM ALL UP. MOST OF THE PEOPLE WHO ARE IN T.D.C. COULD PROBABLY BE DIAGNOSED AS "SOCIOPATH" IN ONE WAY OR ANOTHER . . . IF YOU WANT TO USE THAT TERM. A SIGNIFICANT PORTION OF THEM HAVE BEEN ACCUSED OF SOME KIND OF VIOLENT ACT OR RAPE, MURDER, ARMED ROBBERY, KIDNAPPING, ALL THOSE GOOD THINGS.

THE – WHAT MOST OF THEM DO IS: THEY GO DOWN THERE, [838] AND THEY ENTER THE INSTITUTION, AND THEY'RE PUT TO WORK, AND THEY GO ON ABOUT THEIR BUSINESS AND LIVE THEIR LIFE IN THE INSTITUTION. NOW, FOR THE INDIVIDUAL WHO IS JUST ABSOLUTELY NOT GOING TO COOPERATE WITH THE INSTITUTIONAL ROUTINE, T.D.C. HAS SOME REALLY GOOD THINGS THAT THEY DO IN TERMS OF PROTECTING OTHER INMATES BY ISOLATING THOSE PEOPLE OR REFERRING THEM FOR MEDICAL AND PSYCHIATRIC ATTENTION, SEE IF SOME TREATMENT WOULD BE USEFUL TO THEM FOR THEIR AGGRESSIVE CONDUCT WITHIN THE INSTITUTION. AND THAT'S – THEY DO A GOOD JOB OF CONTROLLING THOSE THINGS.

Q WHEN WAS THE LAST TIME YOU WERE DOWN THERE?

A ABOUT TWO WEEKS –

Q . . . THE TEXAS DEPARTMENT OF CORRECTIONS.

A ABOUT TWO WEEKS AGO.

Q ABOUT TWO WEEKS?

A UH-HUH.

Q DO YOU KNOUT WHAT IT COSTS TO KEEP ANYONE THERE?

A JUST A SHADE OVER THIRTY-SIX DOLLARS A DAY.

Q THIRTY-SIX DOLLARS A DAY. WHAT DOES IT COST TO EXECUTE A PERSON, JUST ON THE AVERAGE, FROM –

A WELL, THERE'S SOME STUFF DONE ON THAT THE OTHER DAY. BY THE TIME YOU GET THROUGH WITH ALL OF THE LEGAL PROCESS THAT'S INVOLVED, IT'S COSTING RIGHT AROUND TWO MILLION DOLLARS AN EXECUTION RIGHT NOW.

Q HAVE YOU EVER BEEN CALLED TO TESTIFY FOR THE STATE?

[839] A YES, I HAVE.

Q HOW MANY TIMES?

A I DON'T KNOW.

Q HOW DO YOU FEEL ABOUT THE DEATH PENALTY?

A WELL, MR. SPENCE, I – YOU KNOW, I CAN SUPPORT A DEATH PENALTY –

MR. ALCALA: YOUR HONOR, I OBJECT. IT'S IRRELEVANT AS TO HIS OPINION OF THE DEATH PENALTY.

THE COURT: WHAT'S THE – WHAT'S THE RELEVANCY OF THIS QUESTIONING, MR. SPENCE?

MR. SPENCE: I'LL WITHDRAW THE QUESTION, YOUR HONOR.

THE COURT: MR. SPENCE, I'LL BE GLAD TO GIVE YOU A BROAD REIN IN REFERENCE TO YOUR LINE OF QUESTIONING.

YOU'VE WITHDRAWN THE QUESTION. PROCEED.

BY MR. SPENCE:

Q ARE YOU GOING TO TELL US HERE TODAY THAT TED'S NOT DANGEROUS?

A NO, I'M NOT.

Q WHAT CAN YOU SAY ABOUT HIS TENDENCIES OF CHANGING SINCE YOU'VE GONE OVER ALL THE REPORTS WITH DR. WRIGHT?

A WELL, MR. SPENCE, I SHOULD SAY I WILL – SINCE I HAVE NOT EXAMINED THE DEFENDANT, I WILL – I WILL REACH NO CONCLU-[840]SIONS. THERE ARE QUESTIONS THAT ARE RAISED IN MY MIND BY WHAT I'VE SEEN AND HEARD THUS FAR. ONE IS WITH RESPECT – IS CONSIDERED TO BE

DANGEROUS AT THIS POINT; AND THAT IS NOT AN UNREASONABLE ASSUMPTION, GIVEN THE EVIDENCE AVAILABLE TO US. FROM WHAT I KNOW, THERE IS – THERE IS GOOD REASON TO DOUBT THAT – THAT ON THIS – ON THE BASIS OF THE STATISTICAL DATA AVAILABLE TO US, THAT DIAGNOSIS WOULD NECESSARILY APPLY FIVE, TEN, FIFTEEN YEARS FROM NOW. I MEAN, WHATEVER CONDITION HE IS SUFFERING FROM IS NOT NECESSARILY IMMUTABLE AND UNCHANGABLE. I MEAN, IT CAN BE CHANGED – I MEAN, TIME CHANGES – I MEAN – AND EXPERIENCE CHANGES PEOPLE. CHANGES IN THE BODY CHANGE PEOPLE.

Q A PERSON JUST GETS OLD?

A OLD PERSON GETS OLDER. THEIR HORMONES CHANGE. THE BRAIN CHANGES. SO IT'S – I MEAN, JUST BECAUSE HE'S DANGEROUS – IF HE'S CONSIDERED DANGEROUS TODAY, DOES NOT NECESSARILY MEAN HE'S GOING TO BE DANGEROUS AT SOME FUTURE POINT IN TIME.

Q WELL, IF YOU – KNOWING WHAT YOU KNOW ABOUT THE CASE AND THE TESTS AND EVERYTHING, IF YOU FOUND OUT THAT HE ATTEMPTED SUICIDE WHILE HE WAS IN JAIL AWAITING TRIAL, WHAT WOULD THAT TELL YOU ABOUT HIM?

A WELL, IT WOULD TELL ME HE WAS VERY DISTRESSED AND DEPRESSED. BUT THE THING ABOUT SUICIDE, PEOPLE THINK [841] SUICIDE – WE USUALLY THINK SUICIDE IS BASED ON NO HOPE. BUT SUICIDE IS REALLY – IN MANY WAYS IS BASED ON HOPE, BUT DISAPPOINTING – I MEAN, HOPE THAT WE CAN BE SOMETHING THAT WE'RE NOT.

AND WHEN WE – PEOPLE ARE COMMITTED TO TRY TO MAKE SUICIDAL ATTEMPTS, IT'S OFTENTIMES BECAUSE THEY'RE VERY ANGRY AT THEMSELVES FOR NOT HAVING BEEN WHAT THEY THOUGHT THEY MIGHT BE.

Q WHAT WOULD A PERSON – WHAT WOULD – IF A PERSON WAS TO WRITE IN A DIARY THAT HE WOULD LIKE TO GO TO SOUTH AMERICA, THE CARIBBEAN, THE MEDITERRANEAN, BECOME A PIRATE, A VIKING, AND ROB, PILLAGE, RAPE, PLUNDER, WHAT WOULD THAT TELL YOU ABOUT A PERSON?

A JUST BY ITSELF?

Q YEAH.

A WELL, IT'S – YOU KNOW, IT'S KIND OF UNUSUAL DANGERING A LITTLE BIT; BUT, IN AND OF ITSELF, I WOULD NOT TAKE THAT AS BEING ABSOLUTELY CONFIRMATORY OF ANYTHING EXCEPT THAT THEY'D THOUGHT ABOUT IT AND PERHAPS FOUND IT A BIT ENTERTAINING OR TITILLATING.

Q I BELIEVE DR. WRIGHT SAID IN MR. COLE'S CASE THAT IT WAS HIS FANTASIES COMING OUT.

A WELL, IT MAY BE A FANTASY, MR. SPENCE, BUT – YOU KNOW, HOW MANY TIMES HAVE YOU SAID, "I WISH I HAD A CABIN UP IN THE MOUNTAINS WITHOUT A TELEPHONE"? IS THAT A FANTASY OR JUST SOMETHING THAT SEEMED LIKE A GOOD IDEA TO YOU AT THE [842] TIME? I MEAN, YOU'RE LIKELY TO THINK OF SOMETHING LIKE THAT ON – ON A REALLY BAD DAY THAN ON A REALLY GOOD DAY. AND THE SAME COULD BE SAID

ABOUT THE CARIBBEAN AND PIRACY OR ALL OF THAT STUFF. MAYBE IT'S A BAD DAY. MAYBE IT'S FANTASY THAT'S – THAT'S CLINICALLY QUITE SIGNIFICANT. I DON'T KNOW.

Q NOW, THE EVIDENCE THAT YOU KNOW ABOUT MR. COLE FROM JARVIS WRIGHT – DR. WRIGHT'S TESTS, WOULD THAT SUPPORT THE DIAGNOSIS OF TED BEING A PSYCHOPATH OR A SOCIOPATH?

A IT COULD WELL BE CONSISTENT WITH – WITH THAT. IT'S ALSO CONSISTENT WITH SEVERAL OTHER POSSIBILITIES. ONE IS THE POSSIBILITY OF AN ATTRIBUTIVE SOCIATIVE REACTION IN WHICH THE INDIVIDUAL IS SIMPLY BLOCKING A LOT – A LOT – I MEAN, IT'S ALMOST A MULTIPLE PERSONALITY KIND OF THING WHERE – I MEAN, YOU GET HIM ACTING ONE WAY DURING ONE PERIOD OF TIME AND THEN A 180 DEGREES DIFFERENT ANOTHER PERIOD OF TIME. YOU KNOW, WE'VE HAD – SEEN SEVERAL MOVIES OF THIS SORT OF THING ON T.V. AND I THINK THE SYBIL CASE WAS – WAS – THAT HAD SALLY FIELD IN IT WAS CERTAINLY AN EXAMPLE OF THAT. THAT IS A POSSIBILITY, AND IT'S CERTAINLY NOT ANYTHING – AS I'VE ALREADY SAID, YOU KNOW, THERE – THERE'S A GOOD DEAL OF THINKING THAT THERE ARE SOME FORMS OF SO-CALLED "SOCIOPATHY" THAT MAY, IN FACT, BE DISSOCIATIVE REACTIONS. THAT IS POSSIBLE.

[843] MR. SPENCE: PASS THE WITNESS, YOUR HONOR.

THE COURT: LET'S TAKE A SHORT RECESS IF WE CAN AT THIS TIME. WE'VE BEEN HERE FOR

QUITE AWHILE. WE'RE GOING TO TAKE ABOUT A FIFTEEN-MINUTE RECESS. I WANT THE BAILIFF TO GIVE THE JURORS AN OPPORTUNITY TO GET A DRINK IF WE HAVE SOME STILL AVAILABLE. IF WE DON'T, WE'LL GO GET SOME MORE. IF YOU'LL GO TO THE JURY ROOM AND TELL THEM WHAT YOUR ORDER IS, WE'LL GET YOU SOMETHING TO DRINK AND ALLOW YOU TO USE THE RESTROOM.

[RECESS]

[THEREAFTER, THE FOLLOWING PROCEEDINGS WERE HAD WITHIN THE PRESENCE AND HEARING OF ALL PARTIES BUT OUTSIDE THE PRESENCE AND HEARING OF THE JURY, TO-WIT:]

THE COURT: WE'RE BACK ON THE RECORD OUTSIDE THE PRESENCE OF THE JURY.

THE STATE HAS INDICATED THEY DESIRE TO RELEASE DR. COONS AND RELEASE HIM FROM THE RULE, LET HIM GO ABOUT HIS BUSINESS. DO YOU HAVE ANY OBJECTION TO THAT, MR. SPENCE?

MR. SPENCE: I HAVE NO OBJECTION TO THAT, YOUR HONOR.

[844] <OUTSIDE PRESENCE AND HEARING OF THE JURY>

THE COURT: DR. COONS IS RELEASED. HE IS RELEASED FROM THE RULE. HE MAY GO ABOUT HIS BUSINESS AS HE DESIRES. SOMEBODY NOTIFY HIM OF THAT.

WHERE IS DR. COONS? UPSTAIRS?

MR. FOHN: HE'S UPSTAIRS. I'LL CALL HIM.

THE COURT: ALL RIGHT.

[THEREUPON, THERE WAS A PAUSE IN THE PROCEEDINGS.]

THE COURT: ARE WE READY TO PROCEED?

MR. FOHN: YES, YOUR HONOR.

THE COURT: DEFENDANT READY TO PROCEED?

MR. SPENCE: YES, YOUR HONOR.

THE COURT: BRING THE JURY IN, PLEASE.

[THEREUPON, A DISCUSSION WAS HAD OFF THE RECORD.]

[THEREAFTER, THE JURY WAS RETURNED TO THE COURTROOM, AND THE FOLLOWING PROCEEDINGS WERE HAD WITHIN THE PRESENCE AND HEARING OF THE JURY, TO-WIT:]

[845] THE COURT: BE SEATED.

THE RECORD WILL REFLECT ALL PARTIES ARE PRESENT. THE JURY IS IN THE BOX.

THE DEFENDANT'S COUNSEL HAD COMPLETED DIRECT EXAMINATION OF THIS WITNESS, AND THE STATE WAS ABOUT TO TAKE THE INDIVIDUAL ON CROSS EXAMINATION. YOU MAY PROCEED.

MR. ALCALA: THANK YOU, YOUR HONOR.

CROSS EXAMINATION

BY MR. ALCALA:

Q NOW . . . DOCTOR, NOW, YOU'RE – YOU ARE A PSYCHOLOGIST; IS THAT CORRECT, SIR?

A THAT'S CORRECT.

Q ALL RIGHT. AND YOU ARE NOT A MEDICAL DOCTOR, ARE YOU?

A NO.

Q AND YOU ARE NOT A PSYCHIATRIST?

A NO.

Q DO YOU KNOW DR. RICHARD COONS OF AUSTIN, TEXAS?

A I HAVE MET DR. COONS, YES.

Q AND DO YOU KNOW OF HIS REPUTATION AS A PSYCHIATRIST?

A HIS REPUTATION IS QUITE GOOD, SIR. I HOLD HIM IN HIGH REGARD.

Q OKAY. NOW, DR. DICKERSON, YOU UNDERSTAND THAT THIS IS THE PUNISHMENT HEARING IN A CAPITAL MURDER CASE OF THE DEFENDANT TED CALVIN COLE, DO YOU NOT, SIR?

[846] A I DO.

Q OKAY. AND YOU UNDERSTAND, OF COURSE, THAT THE ISSUE IS WHETHER THERE'S A PROBABILITY THAT THE DEFENDANT WOULD COMMIT

CRIMINAL ACTS OF VIOLENCE THAT WOULD CONSTITUTE A CONTINUING THREAT TO SOCIETY; IS THAT CORRECT?

A I UNDERSTAND THAT TO BE THE LANGUAGE OF THE STATUTE.

Q ALL RIGHT, SIR. AND YOU STATED THAT YOU HAVE NOT PERSONALLY VISITED WITH THE DEFENDANT, TED CALVIN COLE, AT ALL; IS THAT RIGHT?

A I HAVE NOT.

Q ALL RIGHT. NOW, SIR, SINCE THIS IS THE PUNISHMENT HEARING, IF WE CAN GET RIGHT TO THE HEART OF THE MATTER; AND IF YOU WOULD, BEAR WITH ME AND ASSUME THE FOLLOWING FACTS IN ORDER TO ANSWER THE QUESTIONS. AND I'LL PUT IT IN THE TERM OF A HYPOTHETICAL. IF YOU WOULD, ASSUME THE FOLLOWING FACTS:

ASSUME, PLEASE, FOR THE PURPOSES OF THE QUESTION AT THE END, THAT WHEN A PERSON WAS SIXTEEN – A MALE PERSON WAS SIXTEEN YEARS OLD, THAT HE AND HIS BEST FRIEND GO OUT TO THE LAKE AND THERE THIS SIXTEEN-YEARS OLD PERSON SHOOTS HIS BEST FRIEND IN THE THROAT IN ORDER TO OBTAIN HIS CAR TO GO TO DALLAS. OKAY?

ASSUME THAT HE WAS ARRESTED AND TRIED – AND A STATEMENT TAKEN FROM HIM, IN WHICH HE SAYS HE SHOT HIS FRIEND IN THE THROAT IN ORDER TO OBTAIN HIS CAR. AND [847] FURTHER ASSUME THAT DURING THE TRIAL – OR, THAT HE

PLED "GUILTY" AND RECEIVED A FIFTEEN-YEAR SENTENCE FOR MURDER.

ASSUME FURTHER THAT WHEN HE GETS OUT OF THE PENITENTIARY THAT HE THEN GOES TO LIVE WITH A FAMILY IN DALLAS; AND THERE, SOMETIME IN THE YEAR 1981 OR '82, HE COMMITS AGGRAVATED SEXUAL ABUSE ON TWO YOUNG MEN, ONE EIGHT OR NINE YEARS OLD AND ANOTHER ELEVEN, BY COMMITTING ORAL SEX ON THOSE BOYS. AND FURTHER ASSUME THAT THE MAN THAT WE'RE TALKING ABOUT, THEN BEING AN ADULT OF THE AGE OF – IN HIS EARLY TWENTIES AT THAT TIME AND OUT OF THE PENITENTIARY, ATTEMPTS ANAL INTERCOURSE WITH ONE OF THE BOYS.

ASSUME FURTHER THAT UPON INVESTIGATION OR DISCOVERY BY THE MOTHER THAT SHE CONTACTS THE POLICE AND THAT THEY COME AND THEY OBTAIN A VALID CONSENT TO SEARCH HIS ROOM, AND THEY FIND NEWSPAPER ARTICLES FROM DIFFERENT PLACES IN THE UNITED STATES AND CANADA, EVIDENCING ACTS OF SEXUAL ABUSE AND/OR JUST MATTERS OF SEXUAL ABUSE AND MURDER OF YOUNG BOYS IN THIS PERSON'S ROOM. FURTHER ASSUME THAT HE IS CONVICTED OF THAT OFFENSE AND PLEADS "GUILTY" TO A FIFTEEN-YEAR SENTENCE.

FURTHER ASSUME THAT WHEN HE GETS OUT OF THE PENITENTIARY ON THAT OCCASION AND INDEED ON THE – ON DECEMBER – SOMETIME ON DECEMBER 12TH, HIM AND OTHERS PLAN – DECEMBER 12TH, 1987, PLAN TO KILL AN ELDERLY PERSON WHOM THEY HAVE ALREADY MET; THIS

PERSON BEING A MAN OF SIXTY-[848] SIX YEARS OF AGE, HAVING A GLASS – ONE GLASS EYE, THE OTHER EYE BEING LEGALLY BLIND, AND HIM – AND HE ALSO HAVING AN ENLARGED HEART AND PROBLEMS WITH HIS HEART, LIVING ALONE IN A SMALL APARTMENT COTTAGE BEHIND A LARGER HOUSE.

FURTHER ASSUME THAT THEY PLAN TO ROB THIS OLD MAN AND KILL HIM SOME TWO – ONE TO TWO DAYS BEFORE IN ORDER TO GET MONEY TO LEAVE – TO LEAVE TO ANOTHER – ANOTHER PLACE – TO ESCAPE TO ANOTHER STATE OR PLACE.

AND FURTHER ASSUME THAT ON THE 13TH OF DECEMBER THEY TAKE A CAB OVER TO THE – OVER TO A STORE NEAR WHERE THIS ELDERLY MAN LIVED.

FURTHER ASSUME FOR THE PURPOSES OF THE QUESTION I WILL ASK YOU THAT THEY ARRIVE THERE – OR, RIGHT BEFORE THEY ARRIVE, THIS INDIVIDUAL THAT WE'RE TALKING ABOUT MAKES THE STATEMENT THAT "I WILL" – "I WILL KILL HIM THE FIRST CHANCE I GET," SOMETHING TO THAT EFFECT; THAT THEY GET INTO THE HOUSE, AND THAT AT SOME OPPORTUNITY WITHIN THE HOUSE THAT HE USES A LEASH, A DOG LEASH MADE OUT OF SOME STRONG MATERIAL, THAT HE HAD BROUGHT WITH HIM AND HAD WITH HIM WHEN HE WAS PLANNING THIS MATTER; THAT HE SLIPS THE NOOSE – THE LEASH AROUND THE ELDERLY GENTLEMAN'S NECK AND TAKES HIM DOWN TO THE FLOOR AND SITS ON HIS BACK AND STRANGLES

THE OLD MAN UNTIL HE DIES AND THEN PROCEEDS TO TIE A KNOT IN THE DOG LEASH, MAKING THE LOOP AROUND THE [849] NECK TIGHT AND VERY SMALL.

ASSUME FURTHER THAT THEN – AND WHILE HE'S STRANGLING THE OLD MAN, HE SAYS, "HURRY UP AND DIE."

FURTHER ASSUME FOR THE PURPOSE OF THE QUESTION THAT I WILL ASK AT THE END THAT HE THEN LOOKS AROUND THE HOUSE FOR MONEY.

FURTHER ASSUME THAT HE THEN IS ARRESTED THERE AT THE SCENE THE NEXT DAY. FURTHER ASSUME THAT BEFORE HE'S ARRESTED, THAT AFTER THE – SOMETIME AFTER THIS KILLING, THAT HE GOES TO THE STORE, COMES BACK TO THE APARTMENT WHERE THE BODY IS – AND BUYS BEER AND BRINGS IT BACK AND BUYS SOME FOOD AND EATS IT RIGHT THERE WHERE THE DECEASED – AND GOING BACK AND ASSUMING CERTAIN FACTS BEFORE THAT FACT, THAT HE – AFTER HE STRANGLES THE BODY, HE WRAPS THE BODY IN AN ARMY BLANKET AND THEN TAKES A TOWEL AND WRAPS IT AROUND HIS HEAD AND SECURES IT WITH CLOTHESPINS AND THEN PUTS THE BODY FACE DOWN UNDER THE BED, AND THEN HE GOES AND BUYS THE BEER AND THE FOOD, AND THEY COME – HE COMES BACK, AND HE PREPARES IT AND EATS IT THERE.

FURTHER ASSUME HE'S ARRESTED THE NEXT DAY AT THE SCENE WHILE THERE WITH THE BODY. AND FURTHER ASSUME THAT HE IS TAKEN TO JAIL,

AND WHILE IN JAIL HE WRITES A THREATENING LETTER TO ONE OF THE CO-DEFENDANTS.

FURTHER ASSUME THAT PRIOR TO ALL OF THIS AND DURING SOME MONTHS BEFORE THE KILLING THAT HE HAS A DIARY IN [850] WHICH HE WRITES SUCH THINGS SUCH AS – WHILE HE'S NOT IN CUSTODY, WHILE HE'S FREE, HE WRITES SUCH THINGS AS ON 10-25-87, "MET SOME CUTE LITTLE TWELVE-YEAR-OLD NAMED 'CODY.' I WOULD LIKE TO HAVE HIM SOONER OR LATER," AND THAT HE FURTHER WRITES, "I'M GOING TO FIGURE OUT HOW TO TAKE CODY WITH ME; AND IF HE WON'T GO, I'M GOING TO AT LEAST HAVE HIM BEFORE I GO."

AND THEN ON OCTOBER 28TH, 1987, "I'M SICK OF THIS HUMDRUM EXISTENCE. I NEED SOME EXCITEMENT SO I CAN FEEL" LIKE I'M ABOUT – "THAT I'M ALIVE ONCE IN AWHILE. I WANT TO GO FIND SOMEONE WHO'S YOUNG, ATTRACTIVE, AND WITH A SENSE OF ADVENTURE, WITH WHOM I CAN ROAM AROUND THE WORLD, SAILING IN THE SOUTH PACIFIC AND THE CARIBBEAN, EXPLORING THE MEDITERRANEAN, PARTYING SOMEWHERE IN . . . SOUTH AMERICA JUNGLES" – "IN THE SOUTH AMERICA JUNGLES, SMUGGLING, STEALING, ROBBING, RAPING, AND PILLAGING . . . MODERN-DAY VIKINGS OR PIRATES . . . BECAUSE I NEVER GET ANYWHERE." WELL, SUFFICE IT THERE.

ASSUME THOSE FACTS, SIR.

NOW, FOR THE PURPOSE OF THIS QUESTION, SIR, IF YOU COULD ASSUME THOSE FACTS, I WOULD LIKE TO ASK YOU: IF YOU KNEW THOSE FACTS AND IF YOU ASSUME THEM REGARDING

THAT INDIVIDUAL AND THE ACTION HE'S COMMITTED AND THE THINGS HE'S WRITTEN, IN YOUR MIND, IN YOUR PROFESSIONAL OPINION AND EXPERIENCE, WOULD THERE BE A PROBABILITY THAT THAT [851] PERSON WOULD COMMIT CRIMINAL ACTS OF VIOLENCE THAT WOULD CONSTITUTE A CONTINUING THREAT TO SOCIETY?

A MR. ALCALA, I'M – I DON'T MEAN TO QUIBBLE WITH WORDS – I MEAN – I MEAN, IF YOU'RE GETTING AT "WOULD I BE ALARMED AND WOULD I BE CONCERNED ABOUT THE FUTURE CONDUCT OF SUCH AN INDIVIDUAL?" YES.

YOU USE THE WORD "PROBABILITY." I MEAN, YES, THERE ABSOLUTELY IS A PROBABILITY THAT THEY WOULD COMMIT – COMMIT FUTURE ACTS OF VIOLENCE.

Q THANK YOU, SIR.

A BUT, I MEAN – IF I MAY FINISH MY ANSWER ... BUT THE WORD "PROBABILITY" APPLIES TO LESS LIKELY AS WELL AS TO MORE LIKELY EVENTS. THERE'S ALSO A PROBABILITY THAT YOU WILL COMMIT FUTURE ACTS OF VIOLENCE AND MR. SPENCE AND THIS MAN AND EVERY MEMBER OF THE JURY AND MYSELF AS WELL. IT'S A PROBLEM OF SEMANTICS OR LANGUAGE. "WOULD I BE CONCERNED ABOUT THE FUTURE DANGER OF THE PERSON?" YES.

MR. ALCALA: THAT'S ALL I HAVE OF THIS WITNESS, YOUR HONOR.

THE COURT: ANYTHING ELSE?

MR. SPENCE: I HAVE NOTHING FURTHER, YOUR HONOR.

THE COURT: YOU MAY STEP DOWN.

MAY THIS WITNESS BE EXCUSED?

MR. SPENCE: YES, YOUR HONOR.

* * *

No. CR88-0043-A

THE STATE OF TEXAS	)(	IN THE DISTRICT COURT OF
VS.	)(	TOM GREEN COUNTY, TEXAS
TED CALVIN COLE	)(	51ST JUDICIAL DISTRICT

DEFENDANT'S SPECIAL REQUESTED CHARGE ON PUNISHMENT NO. ONE

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW TED CALVIN COLE, Defendant in the above styled and numbered cause, and pursuant to Art. 36.15, Code of Criminal Procedure, specially requests the Court, in its charge on punishment, to instruct the jury as follows:

"You are instructed that any evidence which, in your opinion, mitigates against the imposition of the Death Penalty, including any aspect of the Defendant's character or record, and any of the circumstances of the commission of the offense which have been admitted in evidence before you, may be sufficient to cause you to have a reasonable doubt as to whether or not the true answer to any of the Special Issues is "Yes"; and in the event such evidence does so cause you to have such a reasonable doubt, you should answer the Issue "No".

Respectfully submitted,

/s/ Bob Spence
Bob B. Spence, P.C.
118 E. 2nd/P.O. Box 1409
Brady, Texas 76825
(915) 597-1005
State Bar No. 18910700
Attorney for Defendant

The foregoing Defendant's Special Requested Charge No. One is _____.

_____
JUDGE PRESIDING

No. CR88-0043-A

)(IN THE DISTRICT COURT OF
)(TOM GREEN COUNTY, TEXAS
)(51ST JUDICIAL DISTRICT

[Caption Omitted In Printing]

DEFENDANT'S SPECIAL REQUESTED CHARGE ON PUNISHMENT NO. TWO

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW TED CALVIN COLE, Defendant in the above styled and numbered cause, and pursuant to Art. 36.15, Code of Criminal Procedure, specially requests the Court, in its charge on punishment, to instruct the jury as follows:

"You are instructed that, in order to answer any of the Special Issues "yes", the Jury must believe unanimously, beyond a reasonable doubt, that the true answer to the Issue is "Yes". In order to answer any Issue "No", however, it is only necessary that ten of the jurors believe that the correct answer is "No". An answer of "No" may be given to any of the Issues if:

"1) at least ten (10) jurors have a reasonable doubt as to whether or not the correct answer should be "Yes"; or

"2) if at least ten (10) jurors find that mitigating factors against the imposition of the Death Penalty exist, either in regard to any aspect of the Defendant's character or record, or in regard to any of the circumstances of the commission of the offense which have been admitted in evidence before you; or

"3) if evidence of any such mitigating factors causes at least ten (10) jurors to have a reasonable doubt as to whether the true answer to the issues is 'Yes'."

Respectfully submitted,

/s/ Bob Spence
Bob B. Spence, P.C.
118 E. 2nd/P.O. Box 1409
Brady, Texas 76825
(915) 597-1005
State Bar No. 18910700
Attorney for Defendant

The foregoing Defendant's Special Requested Charge No. Two is _____.

_____
JUDGE PRESIDING

No. CR88-0043-A

)(IN THE DISTRICT COURT OF
)(TOM GREEN COUNTY, TEXAS
)(51ST JUDICIAL DISTRICT

[Caption Omitted In Printing]

DEFENDANT'S SPECIAL REQUESTED CHARGE ON PUNISHMENT NO. THREE

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW TED CALVIN COLE, Defendant in the above styled and numbered cause, and pursuant to Art. 36.15, Code of Criminal Procedure, specially requests the Court, in its charge on punishment, to instruct the jury as follows:

"You are instructed that you may answer any of the Special Issues "No" if you find any aspect of the Defendant's character or record or any of the circumstances of the offense as factors which mitigate against the imposition of the death penalty."

Respectfully submitted,

/s/ B S
Bob B. Spence, P.C.
118 E. 2nd/P.O. Box 1409
Brady, Texas 76825
(915) 597-1005
State Bar No. 18910700
Attorney for Defendant

The foregoing Defendant's Special Requested Charge No. Three is _____.

_____
JUDGE PRESIDING

No. CR88-0043-A

)(IN THE DISTRICT COURT OF
)(TOM GREEN COUNTY, TEXAS
)(51ST JUDICIAL DISTRICT

[Caption Omitted In Printing]

DEFENDANT'S SPECIAL REQUESTED CHARGE ON PUNISHMENT NO. FOUR

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW TED CALVIN COLE, Defendant in the above styled and numbered cause, and pursuant to Art. 36.15, Code of Criminal Procedure, specially requests the Court, in its charge on punishment, to instruct the jury as follows:

"You are instructed that you may answer Special Issue One "No" if you find any aspect of the Defendant's character or record as factors which mitigate against the imposition of the death penalty."

Respectfully submitted,

/s/ B S
Bob B. Spence, P.C.
118 E. 2nd/P.O. Box 1409
Brady, Texas 76825
(915) 597-1005
State Bar No. 18910700
Attorney for Defendant

The foregoing Defendant's Special Requested Charge No. Four is _____.

_____
JUDGE PRESIDING

No. CR88-0043-A

)(IN THE DISTRICT COURT OF
)(TOM GREEN COUNTY, TEXAS
)(51ST JUDICIAL DISTRICT

[Caption Omitted In Printing]

DEFENDANT'S SPECIAL REQUESTED CHARGE ON PUNISHMENT NO. FIVE

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW TED CALVIN COLE, Defendant in the above styled and numbered cause, and pursuant to Art. 36.15, Code of Criminal Procedure, specially requests the Court, in its charge on punishment, to instruct the jury as follows:

"You are instructed that you may answer Special Issue Two 'No' if you find any aspect of the Defendant's character or record or any of the circumstances of the offense as factors which mitigate against the imposition of the death penalty."

Respectfully submitted,

/s/ B S

Bob B. Spence, P.C.
118 E. 2nd/P.O. Box 1409
Brady, Texas 76825
(915) 597-1005
State Bar No. 18910700
Attorney for Defendant

The foregoing Defendant's Special Requested Charge No. Five is _____.

_____
JUDGE PRESIDING

No. CR88-0043-A

IN THE DISTRICT COURT OF
TOM GREEN COUNTY, TEXAS
51ST JUDICIAL DISTRICT

[Caption Omitted In Printing]

COURT'S CHARGE ON PUNISHMENT

MEMBERS OF THE JURY:

By your verdict returned in this case you have found the defendant, TED CALVIN COLE, guilty of the offense of capital murder which was alleged to have been committed on or about the 13th day of December, 1987 in Tom Green County, Texas. It is necessary, now, for you to determine, from all the evidence in the case, the answers to certain questions called "Special Issues", in this charge. The Court instructs you further, however, as follows:

1. The mandatory punishment for capital murder is death or confinement in the penitentiary for life.

2. The burden of proof in this phase of the trial still rests upon the State and never shifts to the defendant. Each Special Issue submitted must be proved by the State beyond a reasonable doubt; therefore, before any issue may be answered "Yes" ALL jurors must be convinced by the evidence beyond a reasonable doubt that the answer to such Issue should be "Yes". If the jury unanimously determines (and only if such determination is unanimous) that the State has proved an Issue beyond a reasonable doubt, then the Presiding Juror will so record the Jury's answer to such issue by signing the Presiding Juror's

name to the finding reflecting such answer on the form provided for that purpose.

You are further instructed that if any Juror, after considering the evidence and these instructions, has a reasonable doubt as to whether the answer to a Special Issue should be answered "Yes", then such Juror should vote "no" to that Special Issue in the Jury's deliberations.

If ten (10) Jurors or more vote "NO" as to any Special Issue, then the answer of the Jury shall be "NO" to that Issue, and the Presiding Juror will so record the Jury's answer by signing the Presiding Juror's name to the finding reflecting such answer on the form provided for that purpose.

If there is any Special Issue on which the vote of the Jurors is not unanimously "Yes" or not at least ten (10) in favor of an answer of "NO", then there shall be no answer for that Special Issue, (i.e. that particular issue shall remain unanswered) and the Presiding Juror's shall NOT sign the Presiding Juror's name to any answer form for that Special Issue.

3. You are further instructed that in determining each of these Special Issues you may take into consideration all of the evidence submitted to you in the full trial of this case, that is, all of the evidence submitted to you in the first part of this case where in you were called upon to determine the guilt or innocence of the defendant, and all of the evidence, if any, admitted before you in the second part of the trial wherein you are called upon to determine the answers to Special Issues hereby submitted to you.

4. You are instructed that if there is any testimony before you in this case regarding the defendant's having

committed offenses other than the offense alleged against him in the indictment in this case, you cannot consider said testimony or evidence for any purpose, unless you first believe beyond a reasonable doubt that the defendant committed such other offenses, if any were committed, and even then, you may only consider the same only in connection with your determination of Special Issue No. 2.

5. During your deliberations you are not to consider or discuss any possible action of the Board of Pardons and Paroles, or of the Governor, or how long the defendant would be required to serve to satisfy a sentence of life imprisonment.

The Special Issues, with forms for your answers are as follows:

SPECIAL ISSUE NO. 1

Was the conduct of the defendant, TED CALVIN COLE, that caused the death of the deceased, RAYMOND C. RICHARDSON, committed deliberately and with the reasonable expectation that the death of the deceased or another would result?

ANSWER:

We, the Jury, unanimously find and determine beyond a reasonable doubt that the answer to this Special Issue is "Yes".

[Illegible]_____
Presiding Juror

OR

We, the Jury, because at least ten (10) Jurors have a reasonable doubt as to the matter inquired about

in this Special Issue, find and determine that the answer to this Special Issue is "No".

_____
Presiding Juror

SPECIAL ISSUE NO. 2

Is there a probability that the defendant, TED CALVIN COLE, would commit criminal acts of violence that would constitute a continuing threat to society?

ANSWER:

We, the Jury, unanimously find and determine beyond a reasonable doubt that the answer to this Special Issue is "Yes".

[Illegible]
Presiding Juror

OR

We, the Jury, because at least ten (10) Jurors have a reasonable doubt as to the matter inquired about in this Special Issue, find and determine that the answer to this Special Issue is "No".

_____
Presiding Juror

You are the exclusive judges of the facts proved, of the credibility of the witnesses and the weight to be given to their testimony, but the law you [illegible] receive in these written instructions, and you must be governed thereby.

You are instructed that the law provides that the failure of the defendant to testify shall not be taken as a circumstance against him, and you must not allude to, comment

on, or discuss in your retirement the failure of the defendant to testify.

In considering your verdict you shall not receive or consider, refer to or discuss any matter or testimony other than now in evidence before you.

After argument of counsel you will retire and consider your verdict, and after you have arrived at your verdict the Special Issues in the body of this charge shall be answered in accordance with the instructions given you in paragraph 2 of the charge. In addition, the Presiding Juror shall sign the verdict appearing below.

After you have retired to consider your verdict NO ONE has any authority to communicate with you except the officer who has you in charge, and who is referred to as the "bailiff." If you desire to communicate with the Court, you must place your communication in writing, SIGNED BY THE PRESIDING JUROR, and forward the writing on through the bailiff. DO NOT ATTEMPT TO TALK TO THE BAILIFF, THE ATTORNEYS, OR THE COURT CONCERNING ANY QUESTION YOU MAY HAVE. After the attorneys have completed their arguments, the bailiff will take you to the jury room and you will proceed with your deliberations. When you have reached a verdict the Presiding Juror will then notify the bailiff, who will arrange to have you return to the courtroom.

Signed at 3:11 o'clock p.m. on JUN 4 1988

/s/ Randol L. Stout
Randol L. Stout
Judge Presiding

VERDICT OF THE JURY

We, the Jury, return in open court the above answers as our answers to the Special Issues submitted to us, and the same is our verdict in this case.

[Illegible]
Presiding Juror

CAUSE NUMBER CR88-0043-A

THE STATE OF TEXAS	> IN THE DISTRICT COURT OF
VERSUS	> TOM GREEN COUNTY, TEXAS
TED CALVIN COLE	> 51ST JUDICIAL DISTRICT

* * *

[870] YOUR HONOR, LADIES AND GENTLEMEN OF THE JURY:

WHEN WE FIRST BEGAN VOIR DIRE, THERE WAS SOME APPREHENSION BY MEMBERS OF THE JURY ABOUT – DIDN'T KNOW WHAT THE EVIDENCE WAS, WHAT IT WAS GOING TO BE, AND THAT HAD SOMETHING TO DO WITH THE WAY YOU WERE GOING TO ANSWER YOUR QUESTIONS. WELL, AT THIS POINT IN TIME IT'S ALL IN. IT'S ALL THERE. ALL THE EVIDENCE THAT YOU ARE TO CONSIDER IS BEFORE YOU. NOTHING THAT I SAY, NOTHING THAT MR. SPENCE WILL SAY FOLLOWING ME IN CLOSING ARGUMENT, IS EVIDENCE. WHAT I WOULD LIKE TO DO WITH YOU IS TO POINT OUT THAT EVIDENCE THAT IS IMPORTANT, THAT'S THERE FOR YOU TO REMEMBER AND TO LOOK AT.

NOW, THE JUDGE HAS JUST GONE OVER WITH YOU THE SPECIAL ISSUES, SPECIAL ISSUE NUMBER 1, NUMBER 2. IN THE FIRST – THAT FIRST QUESTION THAT YOU HAVE TO ANSWER – AND THAT'S CONSIDERING THE EVIDENCE THAT'S BEFORE YOU. AND I'LL REMIND YOU THAT THE FIRST THING THE STATE DID IN THIS PHASE OF THE TRIAL WAS TO REINTRODUCE ALL OF THE EVIDENCE THAT HAD BEEN PRESENTED IN THE GUILT-INNOCENCE PHASE; SO ALL OF THAT TESTIMONY

FROM THE STAND, FROM THOSE LIVE WITNESSES, THE STATEMENTS, THE CONFESSIONS, THE PHOTOGRAPHS, THE DIAGRAM, ALL OF THAT IS THERE FOR YOUR CONSIDERATION IN ANSWERING THESE QUESTIONS.

THAT FIRST QUESTION YOU'VE GOT TO ANSWER, "WAS THE CONDUCT OF THE DEFENDANT, TED CALVIN COLE, THAT CAUSED THE [871] DEATH OF THE DECEASED, RAYMOND C. RICHARDSON, COMMITTED DELIBERATELY AND WITH THE REASONABLE EXPECTATION THAT THE DEATH OF THE DECEASED OR ANOTHER WOULD RESULT?"

LET'S LOOK AT WHAT THAT EVIDENCE IS IN THE CASE.

IF YOU'LL REMEMBER, IN LISTENING TO THE TESTIMONY, THAT THERE WAS TALK THE NIGHT BEFORE ABOUT KILLING "POPS"; "POPS" BEING MR. RICHARDSON. THE LEASH WAS TAKEN OVER THERE. IT HAD BEEN KEPT FOR A LONG TIME, HAD BEEN PICKED UP AND, AGAIN, THE NIGHT BEFORE, PLACED WITH THE DEFENDANT AND BROUGHT WITH HIM TO THAT HOUSE.

REMEMBER THE WAY – AND "WE TALKED ABOUT PLANNING IT . . . NO NOISE. WE DON'T WANT TO DISTURB THE NEIGHBORS." DISTURB MR. RICHARDSON. THEY DIDN'T WANT TO DISTURB THE NEIGHBORS.

MR. COLE – THE DEFENDANT'S OWN STATEMENT BEFORE THEY GET TO THE HOUSE, "THE FIRST CHANCE, I'M GOING TO KILL HIM." THERE'S NO EVIDENCE OF PROVOCATION. HE WAITED TO

PUT THAT LEASH AROUND MR. RICHARDSON'S NECK UNTIL HE WAS AT A POINT WHERE THEY WEREN'T GOING TO CAUSE PROBLEMS OF NOISE, WHERE HE WAS CLEAR FROM EVERYTHING. HE WAS IN THE DOORWAY OF THE KITCHEN. AND HE CAME UP FROM BEHIND HIM, AND HE PUT THAT LEASH AROUND HIS NECK. HE INTENDED TO DO WHAT HE DID BY THE METHOD IN WHICH HE TIED THAT KNOT WHERE THERE WOULD BE NO PRESSURE LET UP ON MR. RICHARDSON. AS DR. DI MAIO TELLS YOU, THAT HE WOULD PASS OUT IN FIFTEEN, [872] SECONDS, HIS ABILITY TO BREATHE WOULD STOP IN A MINUTE AND A HALF TO TWO MINUTES IF THE PRESSURE WASN'T RELEASED, AND IN TWO TO THREE MINUTES AFTER THAT, HE WOULD DIE.

IT WAS DELIBERATE FROM THE STANDPOINT OF KELLY HICKEY'S TESTIMONY THAT SHE HEARD COLE SAYING, "DIE ... HURRY UP AND DIE." HE KNEW WHAT HE WAS DOING. IT WAS PLANNED OUT.

AND WHEN YOU GET IN THE JURY ROOM, YOU'RE GOING TO HAVE AN OPPORTUNITY TO LOOK AT THIS DEFENDANT'S EXHIBIT NUMBER 3 AND STATE'S EXHIBIT NUMBER 41, THE DIARY – THE COPIES OF THE DIARY. AND I WANT – THE STATE WANTS YOU TO LOOK AT THAT CAREFULLY, BECAUSE THAT DIARY NOT ONLY TALKS ABOUT THOUGHTS OF MR. COLE, BUT IT TALKS AND SHOWS YOU THAT FUTURE PLANNING THAT HE WAS DOING AND PREPARATION FOR THIS. IT SHOWS HIS DESPERATION, HIS WANTING TO GET OUT OF TOWN.

PAGE 20: "WHAT I'D REALLY LIKE TO DO IS GET OUT OF TEXAS WITH SOMEONE YOUNG AND CUTE AND GO TO FLORIDA OR CALIFORNIA OR EVEN MEXICO, SOMEWHERE WHERE IT'S WARM AND SUNNY ALL YEAR AROUND, BUT I NEED MONEY. I NEED TRANSPORTATION." THE SEED'S THERE. HIS PLANNING'S THERE. "I'VE GOT TO" GET TO "THE POINT WHERE I HATE THIS PLACE AND EVERYTHING ABOUT IT. I'VE GOT TO GET AWAY. I JUST DON'T KNOW HOW TO GET IT DONE."

SAME PAGE, NOVEMBER 4TH: "I SAW MCBRIDE YESTERDAY." [873] KELLY HICKEY TOLD YOU MCBRIDE WAS MR. COLE'S – THE DEFENDANT'S PAROLE OFFICER. "SAW McBRIDE YESTERDAY. GOT HIM CONVINCED THAT EVERYTHING'S OKAY, BUT I HAVEN'T BEEN TO WORK SINCE LAST THURSDAY. PLANNING TO GO TO FLORIDA SOMETIME AFTER FRIDAY."

PAGE 22, DECEMBER 2ND: "LOTS OF CATCHING UP TO DO." SATURDAY, THE 7TH, REFERRING TO NOVEMBER THE 7TH:

"MIKE, KELLY, AND I WENT TO POPS," MR. RICHARDSON'S, "AND LEFT WITH HIS LAST TEN DOLLARS."

HE KNEW WHERE TO GET THE MONEY. HE KNEW WHERE THE PLANNING WAS GOING.

FRIDAY THE 27TH, PAGE 25: "MOM GAVE US A HUNDRED DOLLARS. LES TOOK US OUT TO THE TRUCK-STOP ABOUT 3:00 O'CLOCK." AND THEN IT GOES ON FOR THREE PAGES OF HIS ATTEMPT TO

LEAVE AND – LEAVE THIS TOWN AND AS FAR AS GETTING AS FAR AWAY AS MASON.

AND AT ONE POINT ON PAGE 27, TO SHOW HIS ABILITY TO PLAN AND THINK THINGS OUT, "KEN HAD BROUGHT SOME BEER AND WAS GETTING PLENTY WASTED, AND I WAS AFRAID HE'D GET US ALL LOCKED UP; SO I WENT TO THE DAIRY QUEEN AND ARRANGED FOR A WAITRESS THERE TO CALL THE COPS. AFTER THEY PICKED KEN UP, MIKE AND I WENT BACK TO THE TRUCK-STOP AND WAITED THERE, DRINKING COFFEE UNTIL THEY CLOSED." HE GOT RID OF HIS STUMBLING BLOCK. HE GOT RID OF THE THING THAT WAS IN HIS WAY TO ACCOMPLISH HIS DESIRE.

[874] LATER, SAME PAGE: "WE'D BE BETTER OFF BEING IN SAN ANGELO AND GETTING MORE MONEY TOGETHER TO TAKE THE BUS TO OKLAHOMA TO STAY WITH KEITH FOR A COUPLE OF DAYS OR WEEKS AND THEN GO ON TO CALIFORNIA."

PAGE 28: "I SUPPOSE TEXAS WILL HAVE A WARRANT OUT FOR ME BY NOW FOR JUMPING MANDATORY SUPERVISION; SO I'LL HAVE TO LAY LOW FOR AWHILE UNTIL I CAN GET SOME MONEY TOGETHER AND GET OUT OF THE STATE."

YOU SEE THE PLANNING? YOU SEE WHAT HE'S DOING, WHERE HIS THOUGHT PROCESS IS?

LATER THAT SAME PAGE: "SOMETHING SHOULD BREAK FRIDAY NIGHT. IF IT DOES, WE'LL BE IN OKLAHOMA SATURDAY."

DECEMBER 3RD: "TODAY IS THURSDAY, AND IF ALL GOES WELL TOMORROW NIGHT, WE SHOULD BE ON OUR WAY SATURDAY. I THINK WE DECIDED TO GO TO GRANDMA DEAN'S FOR AWHILE, PROBABLY JUST FOR A COUPLE OF DAYS AND THEN ON TO KEITH'S. IF I CAN GET MY LICENSE THE SAME DAY IN OKLAHOMA CITY, WE WON'T BE THERE VERY LONG."

PAGE 20 – PAGE 30: "BUT I THINK WE'LL END UP IN ONE OF THE WESTERN STATES BETWEEN HERE AND CALIFORNIA, NEVADA, UTAH. MAYBE WE CAN GET SOME MONEY TOGETHER."

DECEMBER 12TH, 1987, PAGE 31: "WE'VE ALL THREE BEEN HERE LAST NIGHT, AND RIGHT NOW THEY'VE GONE TO M-SYSTEM TO GET SANDWICHES AND STUFF AND SOME HAIR COLORING FOR KELLY AND I. THEY TALKED TO McBRIDE YESTERDAY. DON'T KNOW HOW [875] HE RECOGNIZED THEM, BUT HE TOLD THEM HE WAS LOOKING FOR ME. AND MIKE SAID I WAS IN OKLAHOMA; LAST TIME HE'D HEARD FROM ME, I WAS HEADED NORTH."

"I THINK" – AND THIS IS PAGE 32: "I THINK WE'RE GOING TO GET A TRUCK TONIGHT AND HEAD FOR SAN ANTONIO, HITCH RIDES THERE. WE SHOULD BE ABLE TO GO ALL THE WAY TO FLORIDA ONCE WE GET THERE . . . IF WE CAN GET THERE."

THE DIARY TELLS YOU HE WANTED OUT. HE WANTED TO GET OUT OF TOWN. HE PLANNED IT. THE PREPARATION WAS THERE. IT WAS ORGANIZED. HE TRIED TO LEAVE, DIDN'T HAVE ENOUGH MONEY; SO WHAT DOES HE DO? PLANS MR.

RICHARDSON'S DEATH TO GET WHAT MONEY HE'S GOT AND TO GET OUT OF TOWN.

DO YOU KNOW WHAT THE ANSWER IS TO SPECIAL ISSUE NUMBER 1? THE STATE WOULD SAY – IT WILL BE THE VERY FIRST ONE – "WE, THE JURY, UNANIMOUSLY FIND AND DETERMINE BEYOND A REASONABLE DOUBT THAT THE ANSWER TO THIS SPECIAL ISSUE IS, 'YES.'" IT'S CLEARLY THAT ON THE EVIDENCE, THE EVIDENCE THAT'S BEFORE YOU. THERE'S NO REASONABLE DOUBT. IT'S ALL THERE.

NOW, YOU'VE GOT A SECOND QUESTION TO ANSWER, AND WE TALKED ABOUT THIS BEFORE: "IS THERE A PROBABILITY THAT THE DEFENDANT, TED CALVIN COLE, WOULD COMMIT CRIMINAL ACTS OF VIOLENCE THAT WOULD CONSTITUTE A CONTINUING THREAT TO SOCIETY?" AGAIN, LET'S LOOK AT THE EVIDENCE.

AGE OF SIXTEEN HE KILLED HIS BEST FRIEND, GARY DON [876] DEDEKER. FROM HIS CONFESSION HE SAYS HE TOOK HIS CAR AND RAN AFTER HE SHOT HIM.

SHERIFF HAYNES TESTIFIED THE GUNSHOT WAS TO HIS THROAT AND THAT HE LAID OUT THERE FOR FOUR TO FIVE DAYS BEFORE HE WAS DISCOVERED . . . WHERE HE FELL.

MICKEY ENGLERT TOLD YOU, NO PROVOCATION, NO PROMPTING OR QUESTION . . . HE TAKES THE DEFENDANT TO THE RESTROOM DURING THE TRIAL. THE DEFENDANT LOOKS BACK AT HIM AND SAYS, "YES, I KILLED HIM. I'D DO IT AGAIN."

KELLY HICKEY MADE THE REMARK, READING SOME TRANSCRIPT NOTES ABOUT THAT TRIAL – SAYS, "SOUNDS LIKE AN ACCIDENT," TO THE DEFENDANT; TO WHICH THE DEFENDANT RESPONDS, "THAT'S WHAT THE JURY WAS SUPPOSED TO THINK. I KILLED HIM TO SEE WHAT IT WAS LIKE TO KILL SOMEBODY." THAT SOMEBODY WAS HIS BEST FRIEND. IF YOU'LL LOOK AT THE PENITENTIARY PACKET, YOU'LL SEE THAT HE GOT A FIFTEEN-YEAR SENTENCE FOR THAT.

HE'S OUT OF THE PENITENTIARY; AND HE'S STAYING WITH A FRIEND OF THE FAMILY, SOMEONE WHO HAS BEFRIENDED HIM, MS. BURNES. SHE ALLOWED HIM TO LIVE IN HER HOME, WHERE HE ACTED TO MS. BURNS A PERFECT GENTLEMAN, IF YOU'LL REMEMBER HER WORDS; THAT HE TREATED HER WELL, TOOK CARE OF HER, AND HE ALSO TOOK CARE OF HER SON, BECAUSE DURING THAT TIME – AND YOU HEARD FROM THE YOUNG MAN, JOHN, WHAT WENT ON. HE SAW HIS BEST FRIEND IN A SEXUAL ACT – HIS FRIEND WAS TWELVE YEARS OLD – WITH THE DEFENDANT. AND THEN THE [877] SEXUAL ACTS WERE COMMITTED ON HIM – ORAL SEX ON HIM.

AND HE WAS ASKED TO DO THE SAME THING TO THE DEFENDANT IN THIS CASE, MR. COLE.

THE COURT: TEN MINUTES.

MR. SMITH: AND THE DEFENDANT ATTEMPTED ANAL INTERCOURSE.

AND CAPTAIN HAMBRICK WENT TO MAKE THE ARREST AND, WITH A SEARCH WARRANT, SEARCHES THE ROOM; AND HE FINDS ANOTHER DIARY THAT DESCRIBED THE DETAILS OF SEXUAL CONTACT BETWEEN HIM AND YOUNG BOYS, AND HE FINDS A WHOLE BUNCH OF NEWSPAPER ARTICLES. THOSE ARTICLES HAD TO DO WITH YOUNG MEN WHO WERE IN TROUBLE EITHER COMMITTING SEXUAL ACTS OR HAVING IT DONE TO THEM OR MURDERS DONE BY THEM OR MURDERS DONE TO THEM. YOU CAN LOOK AT THAT PEN PACKET, THE SECOND CONVICTION, AND YOU'LL SEE.

NOW, YOU'RE GOING TO LOOK AT THE DIARY AGAIN, AND THAT CONSIDERATION AGAIN COMES TO THE FUTURENESS HERE THAT YOU NEED TO ANSWER THAT QUESTION.

ON PAGE 12 OF THE DIARY THERE WAS AN – ON OCTOBER 25TH, '87: "MET A YOUNG, CUTE LITTLE TWELVE-YEAR-OLD NAMED 'CODY.' GOT TO HAVE HIM SOONER OR LATER. T.J. KNOWS A BUNCH OF THEM, AND THEY'RE ALL JAIL BAIT." HE KNEW IT WAS WRONG.

LATER ON, ON PAGE 14, HIS THOUGHTS – HIS INNERMOST ~~THOUGHTS~~: "I'M GOING TO FIGURE OUT HOW TO TAKE CODY WITH [878] ME. AND IF HE WON'T GO, I'M GOING TO AT LEAST HAVE HIM BEFORE I GO."

AND THEN ON PAGE 17: "I'M SICK AND TIRED OF THIS HUMDRUM EXISTENCE. I NEED SOME EXCITEMENT SO I CAN FEEL LIKE I'M ALIVE ONCE IN A WHILE. I WANT TO FIND SOMEONE YOUNG, ATTRACTIVE, AND WITH A SENSE OF ADVENTURE

WITH WHOM I CAN RUN AROUND THIS WORLD, SAILING THE SOUTH PACIFIC, THE CARIBBEAN, EXPLORING THE MEDITERRANEAN, PARTYING SOMEWHERE IN SOUTH AMERICAN JUNGLES, SMUGGLING, STEALING, ROBBING, RAPING, PILLAGING, MODERN-DAY VIKINGS OR PIRATE." YEAH, THIS – THIS IS WHAT HE IS. HE IS A PIRATE. HE TAKES AWAY FROM THOSE WHAT BELONGS TO SOMEONE ELSE. HE TOOK AWAY LIFE FROM TWO INDIVIDUALS. HE TOOK AWAY THE SEXUAL EXPERIENCE OF A YOUNG – TWO YOUNG MEN. HE TOOK PROPERTY THAT DIDN'T BELONG TO HIM, AND HE KILLED FOR THE PURPOSE OF TAKING THAT PROPERTY.

WHAT'S THE ANSWER TO SPECIAL ISSUE NUMBER 2? THE STATE WOULD SAY THAT THE EVIDENCE IS BEYOND A REASONABLE DOUBT THAT "WE, THE JURY, UNANIMOUSLY FIND BEYOND A REASONABLE DOUBT THAT THE ANSWER TO . . . SPECIAL ISSUE" – "THIS SPECIAL ISSUE IS 'YES,'" HE WOULD COMMIT CRIMINAL ACTS OF VIOLENCE THAT CONSTITUTE A CONTINUING THREAT TO SOCIETY.

WHAT DID DR. WRIGHT TELL YOU? THAT THE BEST BAROMETER OF AN INDIVIDUAL'S FUTURE ACTS IS HIS PAST ACTS. [879] AND ALL THAT WE HAVE FROM AGE SIXTEEN NOW THROUGH AGE OF THIRTY-ONE ARE BAD ACTS . . . ONE AFTER ANOTHER.

I'M GOING TO SIT DOWN NOW, AND MR. SPENCE IS GOING TO HAVE A CHANCE TO TALK TO YOU, AND I'LL GET UP AGAIN AND TALK TO YOU ONE

MORE TIME. BUT I WANT YOU TO REMEMBER THOSE FACTS, AND I WANT YOU TO REMEMBER THAT EVIDENCE THAT WAS PRESENTED IN THIS CASE, AND YOU REMEMBER HOW THOSE QUESTIONS SHOULD BE ANSWERED. THANK YOU.

THE COURT: YOU MAY PROCEED.

MR. SPENCE: THANK YOU, YOUR HONOR. MAY IT PLEASE THE COURT . . .

LADIES AND GENTLEMEN:

THERE'S TED COLE. ON VOIR DIRE I INTRODUCED TED TO EACH ONE OF YOU. ALL WE'VE HEARD FROM THAT WITNESS STAND HAS BEEN STORIES ABOUT SOME – REALLY, SOME UNKNOWN INDIVIDUAL. HE'S NEVER BECOME A PERSON. BUT HE IS A PERSON. AND THAT'S WHAT WE'RE HERE FOR TODAY.

THERE'S TWO ISSUES. ONE IS WHETHER HE LIVES, AND THE OTHER IS WHETHER HE DIES. TO GET TO THAT, YOU HAVE TO ANSWER – ANSWER TWO SPECIAL ISSUES.

I CAN'T EXCUSE THE THINGS THAT HAVE HAPPENED IN THE PAST, AND I'M NOT GOING TO. I CAN'T CHANGE THAT.

YOU HEARD DR. DICKERSON SAY ABOUT THE PROBABILITY THAT – SPECIAL ISSUE NUMBER 2, THE PROBABILITY WHETHER OR NOT THERE'S GOING TO BE CONTINUING ACTS OF FUTURE DANGER [880] – OR, FUTURE DANGEROUSNESS. THAT INCLUDES A LESSER DEGREE OF PROBABILITY AS WELL AS MORE.

YOU ALSO HEARD DR. WRIGHT TESTIFY AS TO BURNOUT, WHAT HAPPENS WHEN A PERSON BECOMES FORTY, FIFTY, SIXTY YEARS OLD. THERE'S NO GUARANTEE OF THAT. BUT THERE'S NO GUARANTEE THAT ANYTHING ELSE WILL EVER HAPPEN. IT'S BEYOND A REASONABLE DOUBT THAT SOMETHING HAS TO HAPPEN AGAIN. I DON'T THINK ANY OF US HERE CAN SAY THAT IT WILL HAPPEN – ANYTHING WILL HAPPEN BEYOND A REASONABLE DOUBT AGAIN.

YOU HEARD NANCY HICKEY TESTIFY. TED WAS DESERTED WHEN HE WAS FIVE OR SIX YEARS OLD, PUT IN AN ORPHAN'S HOME. THERE ARE A LOT OF PEOPLE PUT IN ORPHAN'S HOMES. SOME OF THEM TURN OUT GOOD. SOME OF THEM TURN OUT BAD. AND I'M NOT EXCUSING – I'M NOT USING THAT FOR AN EXCUSE. THAT'S JUST A MITIGATING CIRCUMSTANCE. HE WAS SHUFFLED BACK AND FORTH TO HIS AUNT AND UNCLE'S IN OKLAHOMA. HIS MOTHER SAID THAT SHE SAW HIM TWO TIMES IN FIVE YEARS. I HAVE NO IDEA WHAT GOES ON IN TED'S MIND. NONE OF YOU DO. BUT HOW DID THAT CAUSE HIM TO BE AT THE POINT HE IS TODAY? IS THAT HIS FAULT? I DON'T KNOW.

DR. WRIGHT SAID THERE WAS SOMETHING WRONG WITH THE CENTRAL NERVOUS SYSTEM, ALL TESTS INDICATED THAT. MAYBE THAT CAUSED SOME OF IT. I DON'T KNOW.

WHEN TED GOT OUT OF THE ORPHAN'S HOME, HE CAME BACK [881] TO SAN ANGELO. HE HADN'T SEEN HIS FATHER IN ABOUT TEN YEARS. HIS

GRANDFATHER DIED, AND HE WENT TO THE FUNERAL. AND FROM THAT TIME AND POINT FORWARD, HE'S HAD NOTHING BUT PROBLEMS. HE WOULD GO TO LIVE WITH HIS FATHER AND HAVE PROBLEMS. HE'S BEEN REJECTED EVERYWHERE. THE ONLY PEACE HE EVER FINDS IS IN THE PENITENTIARY. AND THAT'S THE ONLY LIFE HE'S EVER KNOWN. HE DOESN'T KNOW HOW – HOW IT IS TO LIVE OUT HERE ON THE STREET. HE HASN'T HAD THE OPPORTUNITY. AND I'M NOT SAYING WE GIVE HIM THE OPPORTUNITY. I DON'T WANT TO GIVE HIM THE OPPORTUNITY. BUT ON THE OTHER HAND, IT'S NOT RIGHT TO KILL HIM JUST TO SHOW THAT KILLING IS WRONG. IT'S NOT.

THE RIGHT THING TO DO IN THIS IS TO ANSWER THOSE SPECIAL ISSUES IN SUCH A MANNER THAT HE BE SENT TO PRISON FOR LIFE.

THERE WAS A LOT OF DISCUSSION ON VOIR DIRE ABOUT THE DIFFERENCE BETWEEN "INTENTIONAL" AND "DELIBERATE."

I WANT YOU TO TAKE THIS DIARY AND READ IT AND GO THROUGH IT. THIS IS TED COLE'S LIFE. ONLY, IT'S A LIFE OF FANTASY. HE'S NEVER LIVED ANY OF THIS OUT. HE'S NEVER TRIED. HE WANTS TO DO THESE THINGS, BUT HE DOESN'T KNOW HOW. HE'S NEVER TRIED. THAT'S A HECK OF A LIFE.

LOOK AT – BACK TO THE TERM "DELIBERATE" AS OPPOSED TO "INTENTIONAL" . . . LOOK IN THAT DIARY ON THE 12TH OF DECEMBER. THERE IS ABSOLUTELY NO MENTION OF THEM WANTING [882] TO DO ANYTHING TO MR. RAYMOND RICHARDSON. THERE'S NO MENTION OF IT. WHY – IF HE'S SO

ALL-FIRED CONCERNED ABOUT KEEPING A DIARY, WHY IN THE WORLD WASN'T THERE SOMETHING IN THAT DIARY ABOUT THEM PLANNING TO KILL THE OLD MAN? THERE WASN'T. I THINK THAT'S AS GOOD AN INDICATOR AS THE DELIBERATENESS AS THERE IS. IT WASN'T PREMEDITATED. IT WASN'T THOUGHT OUT.

TED'S IN THE HABIT OF, EVERY TIME SOMETHING HAPPENS, HE GIVES A CONFESSION. HE WANTS TO GO AND SPILL HIS GUTS AND TELL EVERYBODY EVERYTHING. THAT WAY, HE DOESN'T HAVE ANY PROBLEMS WITH THE OFFICIALS OR THE LAW ENFORCEMENT PEOPLE. HE THINKS HE'S BEING GOOD DOING IT. HE WANTS TO TELL THEM WHAT THEY WANT TO HEAR.

THERE'S ONLY ONE QUESTION IN THIS TRIAL THIS AFTERNOON – IS WHETHER HE LIVES OR DIES.

YOU HEARD KELLY HICKEY TESTIFY. YOU HEARD WHAT SHE HAD PLEA BARGAINED WITH THE PROSECUTOR FOR, THIRTY YEARS. THINK ABOUT THIS. THAT WAS HER GRANDFATHER. TED WAS NO RELATION TO MR. RICHARDSON, BUT KELLY WAS. AND SHE IS JUST AS GUILTY AS TED IS. BUT SHE'S GOING TO THE PENITENTIARY FOR THIRTY YEARS. THE STATE IS ASKING YOU TO KILL TED. CAN YOU IN ALL GOOD CONSCIENCE DO THAT?

LOOK AT ALL THE EVIDENCE AGAIN. GO OVER THE DIARY. THINK ABOUT IT, READ IT, MULL OVER IT . . . AND DECIDE TED'S FATE. BUT BELIEVE IT OR NOT, HE IS A HUMAN BEING. IT'S [883] ONE THING

SITTING OVER HERE AND LISTENING TO WITNESSES TALK ABOUT SOMEONE, AND IT'S SOMETHING ELSE KNOWING THAT HE IS A MURDERER. CAN WE IN ALL GOOD CONSCIENCE SENTENCE HIM TO DEATH?

THANK YOU, LADIES AND GENTLEMEN.

THE COURT: YOU HAVE SIX MINUTES.

MR. SMITH: THANK YOU, YOUR HONOR.

YOU PROMISED THE STATE ON VOIR DIRE THAT YOU'D GIVE FAIR HEARING BOTH TO THE DEFENDANT AND TO THE STATE. YOU ALSO PROMISED THE STATE THAT, IF IT MET ITS BURDEN OF PROOF, YOU WOULD ANSWER THOSE QUESTIONS "YES," TO SPECIAL ISSUE NUMBER 1 AND 2. AND THE STATE SUBMITS THAT IT HAS MET THAT BURDEN. YOU ARE NOT KILLING MR. COLE IF YOU ANSWER THOSE QUESTIONS "YES."

MR. COLE IS HERE TODAY BECAUSE OF HIS OWN ACTIONS SINCE THE AGE OF SIXTEEN. AND HE HAS TO LIVE WITH THE CONSEQUENCES OF HIS OWN ACTIONS. HE'S HERE TODAY BECAUSE OF HIMSELF. AND HE'LL DIE BECAUSE OF HIS OWN ACTIONS IF YOU ANSWER THOSE QUESTIONS "YES." YOU'RE NOT KILLING HIM. HE'S DONE IT TO HIMSELF. SOCIETY HAS THE RIGHT TO PROTECT ITSELF. AND THIS IS A PRIME TIME TO DO IT.

MR. RICHARDSON WAS A PERSON, TOO. YOU HEARD MR. SPENCE TALK ABOUT THE DEFENDANT BEING A PERSON. WELL, YEAH, HE IS; BUT SO WAS MR. RICHARDSON. A FAMOUS AUTHOR ONCE SAID – THORNTON WILDER – THAT WE LIVE BY ACCIDENT

OR [884] WE DIE – AND WE DIE BY ACCIDENT, OR WE LIVE BY PLAN AND DIE BY PLAN. MR. RICHARDSON DIED BY PLAN. AND IT'S EVIDENT BY THE STATEMENTS AND THE EVIDENCE FROM THE STAND, FROM THE CONFESSION THAT YOU'VE READ, AND BY TED CALVIN COLE'S OWN PERSONAL THOUGHTS, HIS OWN PLANS. IT'S HIS PLANS THAT MR. RICHARDSON DIED. HE WAS DELIBERATELY KILLED. HE KNEW WHAT HE WAS DOING TO HIM. THERE WAS A REASON AND A PURPOSE FOR IT, SOLELY AS A MODERN-DAY PIRATE, SO THAT HE COULD TAKE AWAY THAT INDIVIDUAL'S LIFE AND HE COULD TAKE AWAY SOME MONEY SO HE COULD GO ABOUT HIS OWN SELF-SATISFACTION AND GRATIFICATION.

DR. COONS GOT ON THE STAND AND TESTIFIED, AND HE TOLD YOU WHAT THOSE STATEMENTS WAS. FILL IN THE BLANK. ANSWER AN INCOMPLETE SENTENCE. GAVE IT TO THE DEFENDANT. "I REGRET" BLANK; TO WHICH THIS DEFENDANT SAID, "NOTHING," EXCLAMATION MARK.

HE KILLED THE OLD MAN BECAUSE HE WAS OLD, SAT AROUND MOST OF THE TIME ANYWAY AND DRANK VODKA. THAT WAS MR. RICHARDSON'S LIFE TO LIVE AS HE SAW FIT; NOT FOR THIS MAN TO ACT AS GOD AND EXECUTIONER AND TAKE IT FROM HIM.

HE REGRETS NOTHING. HE DID LIVE OUT THE FANTASY IN THAT BOOK. HE DID BECOME THAT MODERN-DAY PIRATE BY STEALING THE MAN'S MONEY, BY STEALING HIS LIFE FROM HIM.

HE WROTE THIS BOOK WHEN HE WASN'T IN PRISON, WHEN HE WAS FREE. HE WROTE THOSE

THOUGHTS DOWN WHEN NO ONE ELSE [885] WAS CONTROLLING HIM. HE DID LIVE OUT THAT FANTASY. THEN IT STOPS ON PAGE 32. IF YOU'LL LOOK AT THAT DIARY, IT GOES TO A HUNDRED – HE'S ALREADY NUMBERED THE BOOK TO PAGE 141. AND WHAT ELSE WOULD BE – WOULD BE THERE?

IT DOESN'T LESSEN THE CRIME THAT HE WASN'T COMMITTED [SIC] TO MR. RICHARDSON. AND WE'RE NOT SAYING KELLY HICKEY IS A NICE YOUNG LADY, BECAUSE SHE'S NOT. TED CALVIN COLE PLANNED THIS, AND YOU CAN SEE IT IN HIS WRITINGS, AND YOU CAN SEE IT BY WHAT HE SAID. HE DID IT. AND YOU CAN SEE FROM THE EVIDENCE OF HIS PAST OFFENSES FROM THE AGE OF SIXTEEN WHERE HE'S ROBBED TWO PEOPLE OF THEIR LIVES, A YOUNG MAN AND AN OLD MAN; STOLE THE YOUNG MAN'S CAR, RAN IN HIS FANTASY TO GO TO DALLAS. AND THEN HE COMMITTED THESE SEXUAL FANTASY CRIMES AGAINST TWO YOUNG MEN, AN EIGHT-YEAR-OLD AND A TWELVE-YEAR-OLD.

FUTURE DANGEROUSNESS? YES. SOCIETY HAS A RIGHT TO PROTECT ITSELF. AND THE TIME IS NOW FOR YOU TO DO YOUR DUTY; AND THAT DUTY IS TO ADMIT THE STATE HAS MET ITS BURDEN OF PROOF IN THIS CASE AND TO ANSWER SPECIAL ISSUE NUMBER 1, "YES," AND SPECIAL ISSUE NUMBER 2, "YES." THAT'S WHAT THE EVIDENCE POINTS TO BEYOND A REASONABLE DOUBT, WHAT YOU HEARD ON THIS STAND, WHAT YOU WILL SEE – WHAT YOU SEE IN THE PAPERWORK. THE TIME HAS COME TO ACT, AND THE TIME IS TO ANSWER – PLEASE, THIS IS A SERIOUS THING, AND I'M NOT

GOING TO MAKE LIGHT OF IT. IT'S A TIME [886] FOR YOU TO CONSIDER IT ALL AND MAKE THAT DECISION AND ANSWER THOSE QUESTIONS CORRECTLY. BUT THE STATE SUGGESTS – STRONGLY URGES AND POINTS TO THE EVIDENCE . . . THE ANSWER IS "YES" TO BOTH THOSE SPECIAL ISSUES.

REMEMBER, YOU'RE NOT KILLING MR. COLE. HE'S DONE IT TO HIMSELF.

THANK YOU.

* * *

NO. CR88-0043-A
WRIT NO. 1

IN THE DISTRICT COURT OF
TOM GREEN COUNTY, TEXAS
51ST JUDICIAL DISTRICT

[Caption Omitted In Printing]

ORDER OF TRIAL COURT RECOMMENDING DENIAL OF DEFENDANT'S APPLICATION NO. #1 FOR POST CONVICTION WRIT OF HABEAS CORPUS
CAPITAL PENALTY CASE

1. *FACTS RE CONVICTION BEING CHALLENGED*: IN Cause No. CR88-0043-A, the petitioner, TED CALVIN COLE was charged by an indictment with the offense of CAPITAL MURDER. On June 4, 1988, petitioner was convicted and based upon the jury's answers to the special issues was sentenced to death. On July 1, 1988 a motion for new trial was filed by the petitioner. On July 31, 1998, a hearing was held on the motion for new trial and after hearing the motion was denied.

2. *APPELLATE HISTORY OF CONVICTION BEING CHALLENGED*: Appeal was automatic and the appeal was docketed by the Court of Criminal Appeals as CCRA No. 70,401. The sole issue raised on appeal was that the evidence was insufficient to support the jury's guilty verdict. On September 26, 1990, the Court of Criminal Appeals issued its opinion affirming the trial court. On October 2, 1990, an application for re-hearing was filed. On November 14, 1990, the Court of Criminal Appeals denied the application for re-hearing. On November 30, 1990, the Court of Criminal Appeals issued the mandate in

the case which was received by the District Clerk on January 12, 1991.

3. *OTHER SIGNIFICANT DATES*:

On January 24, 1991, the District Court signed an order setting a hearing for February 8, 1991 to set an execution date in accordance with Code of Criminal Procedure 43.14 as then in effect. Petitioner was bench warranted to Tom Green County for the February 8, 1991 hearing. An execution date of March 22, 1991 was set.

On March 18, 1991, the Court of Criminal Appeals denied a Motion to Recall Mandate and Stay Execution pending application for writ of certiorari in the Supreme Court of the United States. On that same date, Justice Scalia granted a stay of execution pending disposition by the Supreme Court of the Petition for Writ of Certiorari. On April 22, 1991, the Supreme Court of the United States denied the Petition for Writ of Certiorari.

On July 8, 1991, the District Court again signed an order setting a hearing to set an execution date. The petitioner was again bench warranted to Tom Green County for the hearing which was held on August 13, 1991. A new execution date of September 20, 1991 was set.

On September 10, 1991, petitioner, by his counsel, Carlton McLarty, filed an Emergency Application for Stay or Modification of Execution Date to Permit Filing of Petition for Writ of Habeas Corpus. On that same date, the District Court granted the Emergency Application for Stay. The order granting the stay of execution provided that the Petition for Writ of Habeas Corpus be filed by January 8, 1992 and set a date for hearing on the petition for January 28, 1992.

On January 8, 1992, pursuant to a verbal request by counsel for the petitioner, modified its order granting the emergency stay to allow until March 2, 1992 to file a Petition for Writ of Habeas Corpus and re-setting an evidentiary hearing on the writ, if filed, for March 30, 1992.

On March 2, 1992, Carlton McLarty, as counsel for petitioner, filed the Petition for Writ of Habeas Corpus with the District Court.

On March 20, 1992, the District Court considered a Motion for Continuance and Re-setting of Evidentiary Hearing filed by the petitioner's counsel. The motion was granted and the hearing was re-set for June 29, 1992.

On June 12, 1992, petitioner's counsel filed another Motion for Continuance and Re-setting of Evidentiary Hearing. The primary basis for this motion was the granting of certiorari by the Supreme Court of the United States in *Graham v. Collins,* 950 Fed. 2d 1002 (5th Cir. 1992). The petitioner had relied heavily upon Graham v. Collins in his application and requested in the motion for continuance that all further action in petitioner's case be postponed until the Supreme Court of the United States resolves the issues presented by the *Graham* certiorari petition. The District Court granted the motion for continuance and in accordance with petitioner's request continued all proceedings until further order to allow the Supreme Court to rule in *Graham.*

By letter of June 27, 1993, the District Court was advised by counsel for petitioner that counsel was closing his private practice and was seeking substitute counsel for petitioner. Based upon this letter that counsel for petitioner was seeking substitute counsel, the District Court

continued to hold the proceedings on the petition in abatement.

On January 25, 1993, the Supreme Court issued its opinion in Graham v. Collins, 113 S.Ct. 892. Since the basis for the abatement was awaiting the ruling of the Supreme Court in this case, the District Court expected to hear from either counsel for the petitioner or from the District Attorney that they were ready to proceed with the hearing on the petition. The court received no request to proceed.

On August 31, 1995, Carlton McLarty filed a Motion to Withdraw as Attorney of Record and Appoint Substitute Counsel. The motion requested the District Court to appoint counsel under the provisions of Article 26.05, Code of Criminal Procedure and suggested that such appointed counsel could then petition the Court of Criminal Appeals pursuant to Article 11.071(i) for appointment pursuant to " . . . rules expected to be adopted by the Court of Criminal Appeals. Said rules have not yet been promulgated by the Court of Criminal Appeals, pending recommendations of a panel. . . . " Since the motion was suggesting action based upon rules that had yet to be promulgated, the District Court took no action.

On May 16, 1997, counsel for petitioner filed a Second Motion to Withdraw as Attorney of Record and Appoint Substitute Counsel. On September 15, 1997, petitioner wrote the Judge of the District Court handling the petition. Petitioner's letter advised the Judge that petitioner desired and intended to drop his appeal (presumably the Petition for Writ of Habeas Corpus) and asked that an execution date be set. This correspondence appeared to be at odds with the Second Motion to Withdraw as Attorney

of Record and Appoint Substitute Counsel filed by Carlton McLarty, as there would be no purpose in appointing substitute counsel if petitioner were to abandon his petition for writ of habeas corpus.

On July 15, 1998, Carlton McLarty, filed a Third Motion to Withdraw as Attorney of Record and Appoint Substitute Counsel. Attached to this motion, for the first time, was a Declaration of Defendant signed by petitioner. This Declaration of Defendant states that the petitioner desires the appointment of counsel for the purpose of a writ of habeas corpus. This declaration is in conflict with petitioner's earlier letter to the Judge that petitioner desired to drop his appeal. Based upon these conflicting filings by petitioner and Carlton McLarty, the District Court entered an order allowing Carlton McLarty to withdraw and set a hearing to determine the actual desire of petitioner, being whether petitioner desires to pursue the petition or desires to abandon and withdraw the petition. The District Court had petitioner bench warranted to the hearing.

At the hearing on September 4, 1998, the petitioner advised the District Court that he wished to proceed with the Application for Writ of Habeas Corpus and desired to have the Court of Criminal Appeals appoint counsel on the Application.

On September 29, 1998, the District Court sent the Court of Criminal Appeals a certified copy of its findings under Sec 2(i) of Article 11.071, Texas Code of Criminal Procedure. As of this date the District Court has not been made aware of any attorney having been appointed to represent petitioner on the Application.

4. *PRESENT APPLICATION FOR WRIT*: On March 2, 1992, petitioner filed this application for writ of habeas

corpus. In this application petitioner raises twenty-one points, to wit:

I. The jury heard significant mitigating evidence which it could neither consider nor give effect under the unconstitutionally preclusive Texas sentencing statute, rendering the sentencing determination in his case unreliable, citing Penry v. Lynaugh, 492 U.S. 302, 106 L.Ed.2d 256 (1989).

II. An Estelle v. Smith, 451 U.S. 454 (1981) issue that petitioner's sixth amendment right to counsel was violated when Dr. Robert Coons, a Court appointed psychiatrist, questioned petitioner regarding future danger issues without informing petitioner's trial counsel, Robert Spence, of his intent to do so.

III. A claim that petitioner's appellate counsel, Ancial Middlebrook, provided ineffective counsel on appeal.

IV. A claim that petitioner's rights under Article 14.01, 14.02, 14.03, 14.04 and 38.23 of the Code of Criminal Procedure were violated by petitioner's warrantless arrest.

V. A claim that the trial court improperly admitted petitioner's first statement gained as a result of a warrantless arrest.

VI. A claim that the petitioner's second statement was the product of state coercion.

VII. A claim that the trial court denied petitioner his rights to due process of law, a reliable determination of guilt and sentence, and a fundamentally fair trial by failing to define "reasonable doubt."

VIII. A claim that the special issues result in the arbitrary and capricious imposition of the death penalty.

IX. A claim that Texas law allowing instructions on parole implications in a non-capital offense but not in a capital offense results in a denial of equal protection.

X. A claim that the trial court failed to instruct the jury about parole law and the meaning of a life sentence in a capital case.

XI. A claim that the statute forbade a single juror to give mitigating effect to his desire to return a life sentence by requiring ten votes to return a "No" finding to the special issues.

XII. A claim that the admission of unadjudicated extraneous offenses at the punishment phase deprived petitioner of his Eighth and Fourteenth protections.

XIII. A claim that the trial court failed to instruct the jury that it could consider evidence of prior unadjudicated acts at the sentencing phase only if it believed beyond a reasonable doubt that petitioner committed those acts.

XIV. A claim that petitioner was denied equal protection when the trial court

admitted and jury considered allegations of prior unadjudicated offenses during the punishment phase.

XV. A claim that the jury charge relieved the prosecution of its obligation to prove every element beyond a reasonable doubt.

XVI. A claim that the trial court's charge on punishment failed to instruct the jury to consider mitigating evidence in determining the appropriate punishment.

XVII. A claim that the prosecutors engaged in repeated and continuing misconduct.

XVIII. A claim that the state presented impermissibly inflammatory and prejudicial evidence and argument concerning the character and worth of the deceased.

XIX. A claim that the state improperly presented highly prejudicial photographs as victim impact evidence.

XX. A claim that the trial court erred by requiring prospective jurors to take an oath that the death penalty would not affect their deliberations.

XXI. A claim that the trial court prevented petitioner from presenting mitigating evidence concerning his prior conviction.

5. *DISCUSSION OF PETITIONER'S CONTENTIONS*:

I.

PENDRY [sic] CLAIM

The first claim for relief addressed by petitioner is that his mitigating evidence was not able to be properly considered and given effect by the jury under the special issues presented. The mitigating evidence raised by petitioner was as follows:

1. That petitioner's mother was an alcoholic and unable to care for her children. (Vol. XVII, p. 772)

2. That petitioner's father was arrested for robbing a liquor store. (Vol. XVII, p. 770)

3. That petitioner's father deserted the family before petitioner was five years old. (Vol. XVII, p. 771)

4. That petitioner's family went to live with petitioner's maternal grandparents, who were alcoholics, and who did not want them to live with them. (Vol. XVII, p. 771)

5. That petitioner's maternal grandparents home was eight miles out of town and petitioner was completely isolated from other children. (Vol. XVII, p. 771)

6. That school buses did not run to petitioner's maternal grandparents home and that the grandparents would not allow petitioner's mother to use their car to take petitioner to school. (Vol. XVII, p. 771).

7. That petitioner was placed in an orphanage at five years of age. The record actually reflects that petitioner was placed in a Church of Christ Children's Home where the child must be sponsored. Petitioner's sponsor was his

uncle who was an elder in the Church of Christ. (Vol. XVII, p. 771-774) The record would reflect there being a difference between an orphanage (as alleged by petitioner in the application) and the Children's Home as testified to in the record.

8. That during the five years in the Children's Home (referred to by petitioner in application as an orphanage), petitioner's mother visited only twice. (Vol. XVII, p. 772-773)

9. That when petitioner visited his family at holidays while living in the Children's Home, petitioner seemed incapable of expressing his feelings. (Vol. XVII, p. 790)

10. That petitioner's father never visited him. (Vol. XVII, p. 790)

11. That petitioner moved to San Angelo with his mother and step-father at age eleven, attended school and made good grades. (Vol. XVII, p. 775)

12. That no doubt fearing a return trip to the "orphanage", petitioner was on his best behavior. (Vol. XVII, p. 776)

13. That petitioner tried to be "a perfect child." (Vol. XVII, p. 776)

14. Dr. Jarvis Wright testified that petitioner lacked a great deal of impulse control . . . it indicates some central nervous system damage or very likely central nervous damage. (Vol. XVII, p. 808)

15. Dr. Jarvis Wright testified that the combination of petitioner's impoverished childhood and his neurological

dysfunction have impaired petitioner's judgment and ability to plan ahead. (Vol. XVII, p. 809)

16. Dr. Jarvis Wright testified that "together to make it to where he very often can't behave in another way." (Vol. XVII, p. 809)

17. Dr. Jarvis Wright testified the petitioner lives most of his life in fantasy; that fantasy is the only way he knows how to cope with reality. (Vol. XVII, p. 811)

18. Dr. Jarvis Wright described petitioner's childhood as rugged and rough. (Vol. XVII, p. 806)

19. Dr. Jarvis Wright explained that petitioner had few memories of childhood. (Vol. XVII, p. 807)

20. Dr. Jarvis Wright testified that petitioner's early life experiences were so painful that petitioner erased most mental images from his conscience. (Vol. XVII, p. 807)

21. Dr. Jarvis Wright testified that petitioner's personality is fragmented, and that the reasons and motives behind his behavior are not accessible to petitioner. (Vol. XVII, p. 807)

The issue is whether the sentencing jury had been unable to give effect to petitioner's mitigating evidence within the confines of the statutory "special issues." While *Penry v. Lynaugh,* 492 U.S. 302, 109 S.Ct. 2934, 106 L. Ed. 2d 256 (1989) held that evidence of a defendant's mental retardation and abused childhood could not be given mitigating effect by a jury within the framework of the special issues, the cases that followed such as *Graham v. Collins,* 113 S. Ct. 892 (1993), *Garcia v. State,* 919 S.W.2d 370 (1996), *Mines v. State,* 888 S.W.2d 816 (1994),

and *Zimmerman v. State,* 881 S.W.2d 360 (1994) held that the mitigating evidence of alcoholism, drug abuse, bad family background, bipolar disorder, low I.Q., substance abuse, head injury, paranoid personality disorder and child abuse were sufficiently considered under the special issues. The issue of whether the mitigating evidence can be sufficiently considered must be determined on a case by case basis, depending on the nature of the mitigating evidence offered and whether there exists other testimony in the record that would allow consideration to be given.

The expert testimony of two of petitioner's witnesses provide a basis for the jury to have given consideration to the type of mitigating testimony offered by the petitioner. Dr. Jarvis Wright testified as follows:

1. "I think the research certainly indicates that individuals like Ted, individuals who have had this kind of background, tend to begin to make changes at about forty, forty-five, fifty, somewhere in there. They tend to mellow a bit and change a good bit. You can infer that from some of the FBI crime statistics on age and changes in persons." (Vol. XVII, p. 807)

2. "But I think as we see him age, get older, hormones change, the process of aging takes over, as it does in all of us – and we all change. I think the evidence is overwhelming there that individuals who have behaved as he has change. They burn out. And I think there's a good chance of later in life – not now, but later in life – some changes". (Vol. XVII, p. 813)

3. "We're talking about central nervous system dysfunction. I don't know whether there's damage or not." (Vol. XVII, p. 816)

4. "I'm suggesting that, as we grow older, we change; the compass points a different direction. We're tried [sic].

> We're – we're – our goals, our orientation is different. The research indicates that – that this is the case with individuals who commit violent or antisocial acts." (Vol. XVII, p. 817)

Another defense expert, Wendel L. Dickerson, PhD., the former chief mental health officer for the Texas Department of Corrections, testified as follows:

1. " . . . on the basis of the statistical data available to use, that diagnosis would necessarily apply five, ten, fifteen years from now. I mean, whatever condition he is suffering from is not necessarily immutable and unchangeable. I mean, it can be changed – I mean, time changes – I mean – and experience changes people. Changes in body change people." (Vol. XVII, p. 840)

2. "Old person gets older. Their hormones change. The brain changes. So it's – I mean, just because he's dangerous – if he's dangerous today, does not necessarily mean he's going to be dangerous at some future point in time." (Vol. XVII, p. 840)

The evidence presented at the punishment stage of the trial, especially evidence from the petitioner's expert witnesses, provide a basis for the jury to sufficiently consider the mitigating evidence offered by the petitioner.

There are no controverted, previously unresolved factual issues regarding petitioner's *Pendry* [sic] claim.

II.
ESTELLE CLAIM

Petitioner claims of an *Estelle v. Smith,* 451 U.S. 454 (1981) violation. He complains primarily that his sixth amendment right to counsel was violated when Dr. Robert

Coons, a Court appointed psychiatrist, questioned him regard future danger issues without informing his trial counsel, Robert Spence, of his intent to do so. Since trial counsel died in an automobile accident, there is no purpose to be served by having an evidentiary hearing on whether Mr. Spence was informed of Dr. Coons intent to question petitioner on this issue. Petitioner goes on to claim that this information was used against him at trial.

Assuming for the purpose of this analysis that the portion of the interview by Dr. Coons which dealt with future danger issues was in violation of petitioner's sixth amendment right to counsel, petitioner fails to demonstrate how this interview harmed him. *Estelle* and Sixth Amendment violations in this area are subject to a harm analysis. *Satterwhite v. State,* 108 S.Ct. 1792 (1988); *Wilkens v. State,* 847 S.W.2d 547 (1992).

Estelle error was held harmless in *ExParte Barber,* 879 S.W. 2d 889 (1994). *Barber's* case is very similar to petitioner's on this issue. Like *Barber,* petitioner had previously been convicted of murder. (Vol. XVII, Exhibit 36). Additionally petitioner was convicted of Aggravated Sexual Assault on two pre-teen boy. (Vol. XVII, Exhibit 37).

Dr. Coons testimony on danger issues based upon information obtain by Dr. Coons interview was as follows:

1. "Mr. Cole has a number of sociopathic antisocial personality features to his personality." (Vol. XVII, p. 758).

2. "Well, the history of – that he gave me about his deliberation about this offense that he was doing, this willingness to take the life of another person for financial

gain; the – his prior criminal history, which – which he described to me; his – his feelings and attitude about having committed this offense, in terms of indicating that it did not bother him that he had killed this older man and his rationale for why it didn't bother him, that he was old and all he did was sit around the house and drink vodka, and half the time he didn't know where he was; and the only thing about this that bothers me is getting caught. Those are features of a person with – who has serious conscience defects which you see in sociopathic or antisocial personalities, the lack of remorse for things, the lack of conscience about them" (Vol. XVII, p. 759).

3. "Kind of classic thinking about the sociopathic personality is the – is that they have – that they – do acts against society and that they don't profit from their experiences. They don't learn from experience. They just keep on doing these things because they want to. They don't feel remorseful or guilty about what they've done. It's a – it's a personality pattern, as opposed to just a short-term problem. It's a feature of their personality." (Vol. XVII, p. 767).

Petitioner's own expert witnesses concurred that petitioner was a man who showed a probability for future violence. Dr. Jarvis Wright, a defense expert, testified as follows:

1. "I think if Ted were released today on the street, there's a much greater probability of dangerous behavior than with the rest of us. We can only talk about probabilities. We can't talk in certainties because we don't have crystal balls. But I think there's a probability that all of us are likely to engage in dangerous behavior or in violent behavior. It's not going to be the same for all of us. I think for Ted it's going to be much greater than for most individuals right now. So I think there's a possibility of future violence. I

don't think there's any way we – I think we'd be foolish to say otherwise. I think we're looking at years from now." (Vol. XVII, p. 812-813).

2. Question: "Given the defendant's background, do you think it's more probable that he would commit those acts?"

   Answer: "Absolutely." (Vol. XVII, p. 818-819).

3. Question: " – Do you feel he's a dangerous person?"

   Answer: "Yes."

   Question: "Okay. And isn't it a fact that there's a probability that he would commit criminal acts of violence that would constitute a continuing threat to society in the future?"

   Answer: "I think that probability is stronger than for the rest of us, yes."

4. "Ted has a greater probability than the rest of us of doing something violent if he's turned loose right now." (Vol. XVII, p. 821).

5. Question: "And it's very probable that if a person has committed two murders and sexually abused children, that he's going to – it's probable that he's going to continue doing that; isn't that correct, Sir? There's a greater probability that he's going to continue that; is that correct?"

   Answer: "He would – yes, there would be a greater probability. Not a very probable, but there would be a – there would be a greater likeliness than with those of us in the normal population" (Vol. XVII, p. 823).

Another defense expert, Wendel L. Dickerson, PhD., the former chief mental health officer for the Texas Department of Corrections, testified as follows:

Question: "Now, the evidence that you know about Mr. Cole from Jarvis Wright – Dr. Wright's tests, would that support the diagnosis of Ted being a psychopath or a sociopath?

> Answer: "It could well be consistent with – with that. It's also consistent with several other possibilities. One is the possibility of an attributive sociative reaction in which the individual is simply blocking a lot – a lot – I mean, it's almost a multiple personality kind of thing where – I mean, you get him acting one way during one period of time and then a 180 degrees different another period of time." (Vol. XVII, p. 842).

In reviewing the harm of Dr. Coons' testimony, the State mentioned Dr. Coons only once during closing argument. Dr. Coons' testimony on future danger issues was not the only testimony about future danger. The petitioner's own expert witnesses testified at length about the probability that petitioner would be a danger to society. The complained about testimony of Dr. Coons' was clearly harmless and did not contribute to the verdict obtained.

III.
INEFFECTIVE ASSISTANCE ON APPEAL CLAIM

Petitioner argues that his appellate attorney, Ancial Middlebrook, provided ineffective assistance. In order to sustain this point, petitioner must show: (1) Middlebrook's representation was not reasonable [sic] effective, and (2) there exists a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have [sic] different. *Moore v. State*, 700 S.W. 2d 193 (Tex. Crim. App.), and *Strickland v. Washington*, 466 U.S. 668 (1984).

Middlebrook's representation on appeal was not reasonably effective and the first prong of the Strickland test is satisfied. However, petitioner cannot demonstrate a reasonable probably [sic] that but for the errors, the appeal would have turned out differently.

The first appeal point that petitioner points out should have been raised is the trial court's failure to instruct the jury on mitigating evidence as contemplated by the *Pendry* decision. Applicant is correct that appeal point should have been raised. However, all cases dealing with the type of mitigating evidence presented by petitioner have held that the first two special issues under the old law were sufficient and denied relief. The discussion of the *Pendry* Claim above demonstrates that there would have been no different appellate result had the point been raised.

The second appeal point that petitioner points out should have been raised is the issue of the warrantless arrest and the admission of evidence thus obtained, included petitioner's two statements. The trial court conducted a hearing on the arrest and confession on June 2, 1988. (Vol. XIV, p. 42-176). The trial court found the arrest without warrant valid pursuant to Code of Criminal Procedure Articles 14.03 (A)(1) and (A)(2), as well as Article 14.04. (Vol. XIV, p. 173-176). The Court further found the December 14th confession and a later December 28th confession to be voluntarily given and counsel voluntarily waived. (Vol. XIV, p. 173-176).

The trial judge's findings in a *Jackson v. Denno,* 378 U.S. 368 (1964) hearing will not be disturbed on appeal absent an abuse of discretion demonstrated from the

record of the hearing. *Sherman v. State,* 532 S.W. 2d 634 (Tex. Crim. App. 1976).

Petitioner recounts the testimony on the arrest circumstances and the taking of each of petitioner's two statements. Although the testimony of Cole and the police officers conflicts, the trial judge is the sole judge of the credibility of the witnesses in a suppression hearing. Petitioner fails to point out how the trial judge abused his discretion in making this findings. Considering the high standard on direct appeal, abuse of discretion, petitioner has not met the second prong of *Strickland* in showing specifically how the trial court abused its discretion. Therefore, petitioner cannot show how raising this point on appeal would have changed the result of the appeal.

The third appeal point that petitioner points out should have been raised is the issue of sufficiency of evidence on the future danger issue. As the discussion on the *Estelle* Claim above shows, there was evidence showing petitioner had previously killed another person and had sexually assaulted two pre-teen boys. Even without consideration of the testimony of Dr. Coons, petitioner's own experts testified that petitioner was in fact a person who would probably commit future acts of violence. There is no probability that raising this point on appeal would have changed the result of the appeal.

Since the record is sufficient to determine that Mr. Middlebrook's representation on appeal fell below the first prong of Strickland, there is no need for an evidentiary hearing on this point. The second prong can be evaluated from the trial record itself (as an appeal would have been).

IV.
WARRANTLESS ARREST CLAIM

The discussion of the ineffective assistance on appeal portion above adequately covers this point. No evidentiary hearing is needed.

V.
FIRST CONFESSION CLAIM

The discussion of the ineffective assistance on appeal portion above adequately covers this point. No evidentiary hearing is needed.

VI.
SECOND CONFESSION CLAIM

The discussion of the ineffective assistance on appeal portion above adequately covers this point. No evidentiary hearing is needed.

VII.
DEFINITION OF REASONABLE DOUBT (GEESA) CLAIM

Petitioner asserts that he was denied his rights to due process of law, a reliable determination of guilt and sentence, and a fundamentally fair trial, by the trial court failing to define the term "reasonable doubt" in its charge at both phases of the trial. At the time of trial there was no approved definition of "reasonable doubt" in Texas courts. Geesa v. State, 820 S.W. 2d 154 (Tex. Crim. App. 1991) is not retroactive in its application. No evidentiary hearing is needed.

VIII.
SPECIAL ISSUES RESULTING IN THE ARBITRARY AND CAPRICIOUS, IMPOSITION OF THE DEATH PENALTY CLAIM

Petitioner asserts that the special issues fail to distinguish who will receive the death penalty and who will not, that the special issues are unconstitutionally vague. The claim is the the [sic] result of the special issues is the arbitrary and capricious imposition of the death penalty. No case has ever held this to be true of the Texas death penalty sentencing procedure. No evidentiary hearing is needed.

IX AND X
CLAIM FROM LACK OF PAROLE INSTRUCTIONS AND LACK OF INSTRUCTION ON MEANING OF LIFE SENTENCE

In his IX. point, petitioner asserts that he was denied equal protection of the law by the trial court not instructing the jury on petitioner's eligibility for parole and certain calculations relevant to parole guidelines. The claim is based upon the court's making certain statutory instructions on parole and good time on non-capital offense and the law not providing for similar instructions in a capital case.

In his X. point, petitioner asserts that he was denied his rights under the Eighth Amendment by the trial court not instructing the jury about Texas parole law and the meaning of a life sentence in a death penalty case.

All Texas cases on this issue have held against petitioner's position. *Elliott v. State,* 858 S.W. 2d 478 (1993); *Garcia v. State,* 887 S.W. 2d 846 (1994); *Smith v. State,* 898 S.W. 2d 838 (1995). No evidentiary hearing is needed.

XI
CLAIM THAT TEN VOTES REQUIRED TO RETURN TO NO VOTE FORBIDS A SINGLE JUROR FROM GIVING MITIGATING EFFECT

Petitioner claims that the standard jury instruction requiring ten votes for a "No" answer to a special issue instruction, has the effect of forbidding a single juror from giving mitigating effect to his desire to return a life sentence. Petitioner's position is that this instruction conflicts with the Eighth Amendment requirement that each juror must be allowed to consider and give effect to his conclusion that the evidence does not warrant a sentence of death. This instruction has been uniformly upheld. *Green v. State,* 912 S.W. 2d 189 (1995); *Moreno v. State,* 858 S.W. 2d 453 (1993); *Chambers v. State,* 903 S.W. 2d 21 (1995); *Brigman v. State,* 918 S.W. 2d 466 (1996). No evidentiary hearing is needed.

XII, XIII and XIV
CLAIM THAT THE ADMISSION OF UNADJUDICATED OFFENSES AND THE FAILURE OF THE TRIAL COURT TO INSTRUCT THAT UNADJUDICATED OFFENSE COULD BE CONSIDERED ONLY IF THE JURY FOUND BEYOND A REASONABLE DOUBT THAT THEY WERE COMMITTED

Petitioner in his points XII, XIII and XIV complains of the admission of unadjudicated conduct or bad acts at the penalty phase of his trial. He also complains of the Court's failure to instruct the jury that they could only consider the unadjudicated conduct or acts if they found beyond a reasonable doubt that they were true.

Coble v. State, 871 S.W. 2d 192 (1993) ruled against petitioner's position on a reasonable doubt instruction on unadjudicated conduct. A defendant in a capital case is not entitled to such an instruction.

Gentry v. State, 770 S.W. 2d 780 (1988) held extraneous, unadjudicated offenses are admissible at punishment. Also, Article 37.07(a) of the Texas Code of Criminal Procedure expressly provides for presentation of any matter the court deems relevant to sentence. Although unfair surprise can cause a due process violation, nothing in the record indicates that petitioner was surprised by any matter presented.

Any possible error is harmless due to the overwhelming weight of a prior murder conviction and two aggravated sexual assault convictions. No evidentiary hearing is needed.

XV
CLAIM THAT THE JURY CHARGE AT THE GUILT PHASE RELIEVED THE PROSECUTION OF ITS OBLIGATION TO PROVE EVERY ELEMENT BEYOND A REASONABLE DOUBT

Capital murder requires the State to prove that the defendant possessed a specific intent to kill. Petitioner bases this claim on a portion of the charge that provides as follows:

> "A person acts intentionally, or with intent with respect to the nature of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result"

Petitioner claims that this language relieved the prosecution from proving beyond a reasonable doubt that

petitioner had a specific intent to kill the deceased. Petitioner claims that the charge would allow a jury to convict based solely on a finding that petitioner intentionally engaged in the conduct that caused the death – that is, that petitioner intentionally choked the deceased.

In considering this point, the entire charge must be considered, especially the application paragraph. That paragraph continued the following instruction:

> "Before you would be warranted in convicting the defendant of capital murder, you must find from the evidence beyond a reasonable doubt not only that on the occasion in question that defendant was engaged in the commission or attempted commission of the felony offense of robbery of Raymond C. Richardson, as defined in this charge, but also that during the commission of the robbery or attempted commission thereof, if any, beyond a reasonable doubt that the defendant, on said occasion, specifically intended to kill the said Raymond C. Richardson, when he strangled him, if he strangled him. . . ." (Vol. I, p. 163-171)

The complained of language is appropriate for some of the conduct which must be proved, such as the commission or attempted commission of the felony offense of robbery. The specific instruction that the jury must find " . . . beyond a reasonable doubt that the defendant, on said occasion, specifically intended to kill the said Raymond C. Richardson, when he strangled him, if he strangled him . . . " properly informed the jury of the specific intent, result oriented requirement of capital murder. *Cook v. State,* 884 S.W. 2d 485 (1994); *Hernandez v. State,* 819 S.W. 2d 806 (1991). No evidentiary hearing is needed.

XVI
CLAIM THAT THE TRIAL COURT'S CHARGE ON PUNISHMENT FAILED TO INSTRUCT THE JURY TO MITIGATING EVIDENCE

Petitioner's position is that although the court instructed the jury to consider all the evidence from both portions of the trial, the word "mitigating" was never explained in the Court's instructions. All post Pendry cases in Texas analyze mitigating evidence in the context of the existing special issues and none require an instruction to consider mitigation evidence and none provide a definition. No evidentiary hearing is needed.

XVII
CLAIM THAT THE PROSECUTORS ENGAGED IN REPEATED AND CONTINUING MISCONDUCT

A careful review of the entire record reveals no conduct by the prosecutors that would constitute misconduct. The prosecutor's conduct was proper, and unobjected to by trial counsel, against whom petitioner has made no complaint. No evidentiary hearing is needed.

XVIII
CLAIM THAT THE STATE PRESENTED IMPERMISSIBLY INFLAMMATORY AND PREJUDICIAL EVIDENCE AND ARGUMENT CONCERNING THE CHARACTER AND WORTH OF THE DECEASED

The petitioner's position is that at both phases of the trial, the prosecution present impermissibly inflammatory and prejudicial evidence and argument concerning the character of the decease [sic]. The claim is that those actions deprived petitioner of a fundamentally fair trial at

both the guilt and punishment phases and would require a reversal of petitioner's conviction and sentence. A careful review of the entire record reveals no impermissibly inflammatory and prejudicial evidence or argument. The evidence admitted concerning the decease [sic] was proper as was the argument. No objection was made at trial to the State's jury argument and petitioner makes no compliant with regard to his trial counsel's performance. No evidentiary hearing is needed.

XIX
CLAIM THAT THE STATE PRESENTED HIGHLY PREJUDICIAL PHOTOGRAPHS AS VICTIM IMPACT EVIDENCE

The petitioner's position is that during the State's case in chief, the prosecution offered into evidence numerous photographs depicting the victim's body after the murder. A careful review of both the testimony and of the photographs offered fails to support this position. Some of the photographs offered showed the location of the body, where it was found to confirm testimony of police officers. Other photographs showed the marks on the neck where the ligature was used to strangle the deceased. None of the photographs offered were "gruesome" or "turid and sensational". None of the photographs offered were improper. No objection was made at trial regarding introduction of crime scene photographs and petitioner makes no complaint with regard to his trial counsel's performance. No evidentiary hearing is needed.

XX
CLAIM THAT THE TRIAL COURT ERRED BY REQUIRING PROSPECTIVE JURORS TO TAKE AN OATH THAT THE DEATH PENALTY WOULD NOT AFFECT THEIR DELIBERATIONS

Petitioner complains that the mandatory oath required of a prospective juror by Texas Penal Code, Section 12.31(b) abrogated the jurors sense of responsibility and undermined the reliability of petitioner's death sentence. The courts have consistently disagreed with petitioner's position. Constitutional challenges similar to petitioner's have been denied in *Granviel v. State,* 723 S.W. 2d 141 (1986); *Teague v. State,* 864 S.W. 2d 505 (1993); and *Clark v. State,* 881 S.W. 2d; 682 (1994). No evidentiary hearing is needed.

XXI
CLAIM THAT THE TRIAL COURT PREVENTED PETITIONER FROM PRESENTING MITIGATING EVIDENCE CONCERNING HIS PRIOR CONVICTION FOR MURDER

At trial, petitioner attempted to "go behind" his previous murder conviction and explain the circumstances of the killing by putting petitioner's mother on the stand. The trial court immediately recognized the testimony of the mother to be hearsay, and did not allow it. The portions of comments made by the trial judge, outside the presence of the jury, are as quoted by petitioner taken out of context. The trial court and defense counsel had the following discussion:

The Court: "Now, I don't see how you're going to get into that based upon hearsay, but if you can tell me how you're going to get there and where

you're going to, then I'll certainly allow it. I'm not trying to – I want you to be able to do the very best you can for your client and put on whatever you believe is necessary for – in your client's interest. But that's hearsay."

Mr. Spence: "I cannot get there from here, your Honor." (Vol. XVII, p. 782-783).

A careful review of the record does not support petitioner's position that the trial court prevented petitioner from presenting mitigating evidence. Instead a review of the record reveals that the trial court was willing to allow defense counsel to present anything that was proper, but would not allow improper hearsay testimony. No exception to the hearsay rule was cited by defense counsel which would have allowed the testimony. No evidentiary hearing is needed.

6. *RECOMMENDATION OF THE TRIAL COURT ON PETITIONER'S CONTENTIONS*: The undersigned trial judge finds there is no merit to the application for writ of habeas corpus, and no useful purpose would be served by holding an evidentiary hearing. It is recommended that the petitioner's application be in all things DENIED.

7. *ATTACHMENTS TO THIS ORDER*: Attached to this order are the following:

a. Defendant's application for writ of habeas corpus filed on March 2, 1992 consisting of one hundred nineteen (119) pages;

b. A copy of the indictment in Cause No. 3644;

8. *ORDER RE DISTRIBUTION*: The following distribution shall be made of this order, complete with attachments:

a. The original shall be mailed to the Clerk, Court of Criminal Appeals, P.O. Box 12308, Capitol Station, Austin, Texas 78711;

b. A copy shall be delivered to the District Attorney for the 51st Judicial District, San Angelo, Texas 76903;

c. A copy shall be mailed to the petitioner, TED CALVIN COLE, #906, Ellis I Unit – D/R, Huntsville, Texas 77343

d. A copy shall be filed in File No. CR88-0043-A

SIGNED this the 10 day of May, 1999.

/s/ John E. Sutton
John E. Sutton
District Judge Presiding

[SEAL]

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. 41,673-01

EX PARTE TED CALVIN COLE, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS FROM TOM GREEN COUNTY

The order was delivered per curiam. Womack, J., filed a dissenting opinion, in which Price, J., joined; Meyers, J., shown not participating.

ORDER

This is a post conviction application for writ of habeas corpus filed pursuant to the provisions of Article 11.07, V.A.C.C.P.

On June 4, 1988, applicant was convicted of the offense of capital murder. The jury answered the special issues submitted pursuant to Article 37.071, V.A.C.C.P., and the trial court, accordingly, set punishment at death. Applicant's conviction was affirmed on direct appeal to this Court. *Cole v. State,* No. 70,401 (Tex. Crim. App. delivered September 26, 1990).

In his application, applicant presents twenty-one allegations in which he challenges the validity of his conviction and resulting sentence and alleges ineffective

assistance of counsel at trial and on appeal. The trial court did not hold an evidentiary hearing. The trial court entered findings of fact and conclusions of law with regard to applicant's allegations, recommending that the relief sought be denied.

This Court has reviewed the record with regard to applicant's allegations. We adopt the trial court's findings of fact and conclusions of law with the exception of the conclusion that trial counsel rendered deficient performance under allegation three and the conclusion concerning all post-*Penry*[1] cases under allegation sixteen. Upon such basis, the relief sought is denied.

IT IS SO ORDERED THIS THE 24TH DAY OF NOVEMBER, 1999.

PER CURIAM

EN BANC
DO NOT PUBLISH

---

[1] *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934 (1989).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

TED CALVIN COLE, Petitioner, V. GARY L. JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division, Respondent.	CIVIL ACTION NO. 6:00-CV-014-C DEATH PENALTY CASE

ORDER

(Filed Mar. 5, 2001)

The Court has considered the Petition for Writ of Habeas Corpus by a Person in State Custody filed by Petitioner, Ted Calvin Cole (Cole), on June 1, 2000, together with Respondent's original and amended Answers and Motions for Summary Judgment and Cole's replies filed thereto. The relevant state court records have also been reviewed by the Court, along with additional documentary evidence and affidavits submitted by the parties.

BACKGROUND

The Director has custody of Cole pursuant to a judgment and sentence from the 51st Judicial District Court of Tom Green County, Texas, in Cause No. CR88-0043-A, styled *The State of Texas vs. Ted Calvin Cole.*

Cole was indicted on January 7, 1988, for the capital offense of murdering Raymond C. Richardson in the course of committing and attempting to commit the offense of robbery, which occurred on or about December 13, 1987.

On June 3, 1988, a jury found Cole guilty of capital murder. Following a separate punishment hearing, on June 4, 1988, the jury answered affirmatively the two special issues submitted pursuant to Tex. Code Crim. Proc. art 37.071(b), and Cole was sentenced to death.

Appeal was automatic to the Texas Court of Criminal Appeals, which affirmed Cole's conviction in an unpublished opinion delivered September 26, 1990. *Cole v. State*, No. 70,401 (Tex. Crim. App. 1990). Rehearing was denied on November 14,1990, and the mandate issued thereafter on November 30, 1990.

On April 22, 1991, the United States Supreme Court denied certiorari review. *Cole v. Texas*, 499 U.S. 982 (1991).

An execution date was set for September 20, 1991, and attorney Carlton McLarty filed an application for stay on September 10, 1991, and sought permission to file a state habeas application. Thereafter, Cole, through his habeas attorney, filed a state writ of habeas corpus petition on March 2, 1992. The trial court issued findings of fact and conclusions of law on May 10, 1999, recommending denial of habeas relief on all of Cole's claims. The trial court did, however, find that Cole's appellate attorney was not reasonably effective but that Cole could not demonstrate prejudice.

On November 24, 1999, the Texas Court of Criminal Appeals adopted the trial court's findings and conclusions

with two exceptions: the trial court's conclusion that Cole's attorney rendered deficient performance under state writ allegation three (ineffective assistance for failing to raise any colorable points of error on appeal) and the conclusion that under allegation sixteen (trial court's charge on punishment failed to instruct the jury to consider mitigating evidence in determining the appropriate punishment) "all post-*Penry* cases in Texas analyze mitigating evidence in the context of the existing special issues and none require an instruction to consider mitigating evidence and none provide a definition."

The Court of Criminal Appeals then denied habeas relief by written order on November 24, 1999. *Ex parte Cole*, Application No. 41,673-01.

On February 7, 2000, Cole moved for appointment of attorneys Robert C. Owen and Raoul D. Schonemann to initiate federal habeas proceedings; this Court granted the request on February 10, 2000; and Cole filed his federal writ of habeas corpus petition on June 1, 2000, pursuant to 28 U.S.C. § 2254.

The Respondent filed his answer and motion for summary judgment on June 29, 2000, and Cole filed a reply July 24, 2000.

Pursuant to the Court's February 28, 2000, scheduling order, a hearing was held on August 2, 2000, at which time both parties presented oral arguments. No witnesses were called by either party. The Respondent argued that Cole's ineffective-assistance-of-counsel claims were procedurally barred, and Cole's attorneys argued that Cole could meet the cause and prejudice standard for failure to exhaust the ineffective-assistance-of-counsel claims. Although the Respondent's attorney argued procedural bar, she requested

permission to respond to the ineffective-assistance-of-counsel claims should the Court find that Cole had shown cause and prejudice. The Court permitted the parties to expand the record on the procedural bar issue. Thereafter, the Court found that Cole had shown cause and prejudice for failing to exhaust his ineffective-assistance-of-counsel claims based upon the record indicating that from June 12, 1992, until July 15, 1998, Cole's habeas attorney attempted to withdraw from representation, but the trial court failed to rule on the motions to withdraw. Then, after permitting habeas counsel to withdraw, the trial court held a hearing on September 4, 1998, to determine if Cole wanted to pursue his state habeas proceeding and if he wanted an attorney. At that hearing, the trial court advised Cole that he would prepare the necessary paperwork to the Court of Criminal Appeals to request that the Court of Criminal Appeals appoint an attorney. On May 10, 1999, without an attorney having been appointed to represent Cole and without notice to Cole, the trial court entered its findings and conclusions recommending denial of habeas relief. The Court of Criminal Appeals denied relief on November 24, 1999, without an attorney having been appointed to represent Cole.

This Court found that Cole had shown cause and prejudice for his failure to exhaust his ineffective-assistance-of-counsel claims, and Respondent was permitted to file a supplemental Answer and Motion for Summary Judgment. Cole then filed a reply.

JURISDICTION

This Court has jurisdiction over the subject matter and the parties pursuant to 28 U.S.C. §§ 2241, 2254.

STANDARD OF REVIEW

Cole's federal habeas petition was filed June 1, 2000, a date after the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("the AEDPA"); thus, his claims must be reviewed under the amended habeas provisions effected by the Act. *Nobles v. Johnson*, 127 F.3d 409, 415 (5th Cir. 1997).

THE OFFENSE

Cole was found guilty of murdering Raymond C. Richardson while in the course of committing and attempting to commit the offense of robbery. Cole gave two sworn statements confessing to the murder by strangulation and robbing Mr. Richardson of $20.00. Cole's half-brother and his wife participated in the criminal offense. Cole's sister-in-law testified against Cole at the trial. Evidence was submitted that Cole had a prior conviction for murder and a conviction for two counts of aggravated sexual assault involving minors.

CLAIMS FOR RELIEF

CLAIM ONE

The jury that sentenced Cole to death was unable to consider and give effect to the mitigating evidence in his case, in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution

Cole's first claim is that the Texas capital sentencing scheme failed to provide the jury with any vehicle by which to give mitigating effect to evidence of Cole's "destructive family background" and "organic neurological

deficits" in violation of the Sixth, Eighth, and Fourteenth Amendments.

During the punishment phase, Cole presented testimony from Cole's mother and Cole's aunt regarding Cole's alleged "destructive family background" –

1. that Cole's mother was an alcoholic who was unable to care for her children;

2. that his father was arrested for trying to rob a liquor store;

3. that his father deserted the family when Cole was five years old;

4. that Cole's mother moved with her children to her parents' home;

5. that Cole's grandparents were alcoholics and did not want the children to live with them;

6. that Cole's grandparents' home was eight miles out of town and Cole was isolated from other children;

7. that school buses did not run to the grandparents' home and the grandparents would not allow Cole's mother to use their car to take Cole to school;

8. that Cole was placed in a children's home at age five;

9. that during Cole's five years in the home, his mother only visited two times;

10. that Cole's father never visited Cole at the home; and

11. that Cole's uncle adopted Cole's brother, but not Cole.

In addition, Dr. Jarvis Wright testified that Cole had a "very rugged, rough childhood"; that he showed evidence of having experienced "a bad, very painful background"; that he "never felt loved and worthwhile in his life," all resulting in Cole's experiencing "terrific needs for nurturance" and "chronic depression."

No testimony was presented that these events caused any type of psychological effect on Cole. Instead, the opposite was shown – Cole's mother testified that when she and Cole moved to San Angelo when Cole was age eleven, he attended school, made good grades, had no trouble with the law, and "tried to be a perfect child." Cole's aunt Barbara Dean testified that she and her husband sponsored Cole while he was in the children's home, provided him clothes, and allowed him to visit their home for holidays. At best, Mrs. Dean testified that Cole had a good time while visiting, but that he never showed any emotion about returning to the children's home.

Regarding Cole's alleged "organic neurological deficiency," Cole relies on testimony from Dr. Jarvis Wright which states that Cole "lacked a great deal of impulse control. And I think that's important in these tests I gave. . . . It indicates some central nervous damage or very likely central nervous damage. Combine that and all the other factors of [Cole's] background, all these other things, we're going to have an individual with some real problems with impulse control." However, on cross-examination, Dr. Wright admitted, "I don't know whether there's [central nervous system] damage or not," and that the only way to determine it "sometimes is [with] a post-mortem examination." Wright also admitted that the Haptic Visual Discrimination Test, the test Wright described as providing the basis for his conclusion that Cole had central nervous

damage, is based solely on Cole's subjective descriptions of objects hidden behind a screen which he attempts to identify through touch and was not based on any objective criteria.

Several witnesses and defense counsel attested to Cole's ability to change his behavior over time, indicating that any condition was not permanent. Dr. Jarvis Wright testified that research indicates that "individuals like [Cole], individuals who have had this kind of background, tend to begin to make changes at about forty, forty-five, fifty, somewhere in there. They tend to mellow a lot and change a good bit." He also testified that the factors that "cause maladaptive, maladjustive behavior tend to change" as a person gets older. Wright also stated that "evidence is overwhelming" that there are individuals who have behaved like Cole and who "burn out" such that there is a "good chance" of some change later in life. Defense witness Dr. Wendel Dickerson testified that just because Cole may be considered dangerous today does not mean that he is going to be dangerous in the future because factors such as time, experience, bodily changes, and other conditions all change. During closing argument, defense counsel pointed out Dr. Wright's testimony "as to burnout, what happens when a person becomes forty, fifty, sixty years old. There's no guarantee of [Cole causing a future act of violence]. But there's no guarantee that anything else will happen."

At the conclusion of the punishment phase, the jury answered affirmatively both special issues submitted pursuant to Tex. Code Crim. Prot. art; 37.071(b):

> (1) Was the conduct of the defendant, TED CALVIN COLE, that caused the death of the deceased, RAYMOND C. RICHARDSON,

committed deliberately and with the reasonable expectation that the death of the deceased or another would result?

(2) Is there a probability that the defendant, TED CALVIN COLE, would commit criminal acts of violence that would constitute a continuing threat to society?

The jury charge also contained the following instruction:

> You are further instructed that in determining each of these Special Issues you may take into consideration all of the evidence submitted to you in the full trial of this case, that is, all of the evidence submitted to you in the first part of this case wherein you were called upon to determine the guilt or innocence of the defendant, and all of the evidence, if any, admitted before you in the second part of the trial wherein you are called upon to determine the answer to Special Issues hereby submitted to you.

In *Penry v. Lynaugh*, 492 U.S. 302 (1989), the Supreme Court found that when the defendant places mitigating evidence before the jury, Texas juries must be given instructions which allow the jury to give effect to that mitigating evidence and to express its reasoned moral response to that evidence in determining whether to impose the death penalty.

The Fifth Circuit has formulated a two-pronged analysis for evaluating *Penry* claims which applies to the instant case. To be entitled to relief, a habeas petitioner must demonstrate that the proffered evidence was constitutionally relevant mitigating evidence, and, if he so

demonstrates, he must show that the proffered evidence was beyond the "effective reach" of the jurors. *Madden v. Collins*; 18 F.3d 304, 308 (5th Cir. 1994) (citing *Johnson v. Texas*, 509 U.S. 350, 365-67, 113 S. Ct. at 2668-69); *Davis v. Scott*, 51 F.3d 457, 460 (5th Cir. 1995). Before the court may determine whether the [jury] instructions adequately allowed for mitigation the court must fast determine whether the mitigating evidence was constitutionally relevantion". *Etheridge v. Johnson*, 49 F.Supp.2d 963, 986 (S.D. Tex. 1999).

With regard to the first prong, the Fifth Circuit has held:

> The first inquiry in a *Penry* claim is whether the mitigating evidence is relevant. Phrased differently, does the evidence implicate the basic concern of *Penry* that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse. . . . In order to present relevant evidence that one is less culpable for his crime, the evidence must show (1) a *uniquely severe permanent handicap* with which the defendant is burdened through no fault of his own, . . . and (2) that the *criminal act was attributable to this severe permanent condition.*

Davis v. Scott, 51 F.3d at 460 (internal quotations and citations omitted, emphasis added); *see also Madden v. Collins*, 18 F.3d at 307 (requiring "nexus" between mitigating evidence and criminal act to establish *Penry* violation); *Harris v. Johnson*, 81 F.3d 535, 539 (5th Cir. 1996) (same); *Turner v. Johnson*, 106 F.3d 1178, 1189 (5th Cir. 1997) (same). If the evidence presented is not constitutionally relevant mitigating evidence, then the court can reject the

Penry claim on that basis and need not address the second prong. *Madden v. Collins*, 18 F.3d at 308 (rejection of *Penry* claim may be based on failure of the evidence relied upon to be constitutionally relevant mitigating evidence).

With regard to the second prong, the constitutionality of the Texas capital sentencing scheme, which considers mitigating evidence solely through the special issues, "turns on whether the enumerated questions allow consideration of particularized mitigating factors." *Madden v. Collins*, 18 F.3d at 306 (quoting *Jurek v. Texas*, 428 U.S. 262, 272, 96 S. Ct. 2950, 2956 (1976)). Thus, assuming evidence presented during punishment is constitutionally relevant mitigating evidence, then the requirements of the Eighth Amendment are satisfied if the mitigating value of the evidence, as actually proffered at trial, is within "the effective reach" of the jury in responding to the statutory punishment issues and instructions. *Johnson v. Texas*, 509 U.S. 350, 368 (1993); *Graham v. Collins*, 506 U.S. 461, 475 (1993). Mitigating evidence is beyond the effective reach of the sentencer only if there exists a "reasonable likelihood that the jury would have found itself *foreclosed* from considering [the mitigating evidence]" in answering the special punishment issues submitted to the jury. *Johnson v. Texas, supra* (emphasis added). A special jury instruction is then required only if a "major mitigating thrust" of the evidence was substantially beyond the scope of all the special issues. *Graham v. Collins*, 950 F.2d 1009, 1026-27 (5th Cir. 1992); *see Barnard v. Collins*, 958 F.2d 634, 637 (5th Cir. 1992) (same).

While "the sentencer must be allowed to consider in mitigation 'any aspect of the defendant's character or record and any circumstances of the defense that the defendant proffers as a basis for a sentence less than

death,' ... [n]othing in the Constitution obligates state courts to give mitigating evidence instructions when no evidence is offered to support them." *Delo v. Lashley*, 507 U.S. 272, 275-77 (1993) (quoting *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S. Ct. 2954, 2965 (1978)). It follows, then, that a death-sentenced inmate is not entitled on appeal to recharacterize evidence as mitigating in a manner different from that in which it was proffered to the sentencer.

Finally, although relevant mitigating evidence may not be placed beyond the effective reach of the sentencer, the Constitution does not require unfettered sentencing discretion in the jury, and a state may guide the sentencer's consideration of mitigating evidence in an effort to achieve a more rational and equitable result. *Buchanan v. Angelone*, 522 U.S. 269, 276 (1998); *Tuilaepa v. California*, 512 U.S. 967, 971, (1994); *Johnson v. Texas*, 509 U.S. at 362. Thus, there is no requirement that a jury be allowed to give effect to mitigating evidence in every conceivable manner in which the evidence might be relevant. *Johnson*, 509 U.S. at 372. If mitigating evidence is within the effective reach of the jury, the fact that a defendant can identify mitigating value beyond the scope of the statutory issues does not require the submission of an additional issue or instruction allowing the jury to give further mitigating effect to the evidence. *Id.*; *Graham v. Collins*, 506 U.S. at 474; *see also Boyde v. California*, 494 U.S. 370, 382 n.5 (1990) (defendant is entitled only to a fair vehicle by which sentencer can give effect to mitigating force of his evidence). The defect identified in *Penry* was that the jury was prevented from giving *any* mitigating effect to the evidence. *See Saffle v. Parks*, 494 U.S. 484, 489 (1990).

Cole claims that his "destructive family background" evidence was mitigating but that the jury was unable to give effect to the evidence. Although such evidence can be considered mitigating, in *Cole's* case the evidence fails to meet the standard.

In *Graham v. Collins*, 950 F.2d at 1033, a majority of the Fifth Circuit observed that a defendant who introduced evidence of the adverse effects of a troubled childhood might well raise a *Penry* claim. However, the court did not find a *Penry* issue in Graham's case because there was "no evidence of any effect this [evidence of abused childhood] had on Graham, or any reaction on his part to it, and no attempt was made to even explore that subject" *Id.* The Fifth Circuit has recognized that an abused childhood could rise to the level of a *Penry* claim "if the traumatic events *caused* psychological effects to which the criminal conduct was attributable." *Madden v. Collins*, 18 F.3d at 308 (emphasis added) (citing *Barnard v. Collins*, 958 F.2d at 638-39)). There testimony revealed that Barnard's parents divorced when he was four years old, that Barnard lived alone with his mother until age thirteen, that Barnard's father was absent from his life during this period, that there were "difficulties" when Barnard was later sent to live with his father, and that Barnard later lived with an uncle. *Barnard v. Collins*, 958 F.2d at 638. However, the Fifth Circuit correctly affirmed the district court's rejection of Barnard's portrayal of this testimony as mitigation evidence of permanent characteristics or disabilities stemming from his troubled childhood because there was "no evidence that these childhood experiences had any psychological effect on Barnard" and thus later led to his commission of the capital offense. *Id.* at 639.

Based on the record of proceedings before the Court, Cole's evidence of a "destructive family background" fails to suffice as mitigating evidence. Cole fails to show that his commission of capital murder was in any way attributable to his "destructive family background," and thus his evidence does not fall within the ambit of *Penry*. *See Davis v. Scott*, 51 F.3d at 460 (requiring nexus). Dr. Jarvis Wright's punishment phase testimony failed to establish that Cole's childhood trauma "caused psychological effects to which the criminal conduct was attributable." *Madden v. Collins*, 18 F.3d at 308 (emphasis added) (citing *Barnard v. Collins*, 958 F.2d at 638-39). Because no nexus was established between events in Cole's childhood and his later commission of the capital murder offense, the testimony did not reveal constitutionally relevant mitigating evidence.

Cole's claim regarding destructive family background may be rejected because the evidence relied upon fails to be constitutionally relevant mitigating evidence. As the Fifth Circuit explained in *Madden v. Collins*:

> [R]ejection of a *Penry* claim does not necessarily mean in every case that the jury was able to evaluate the proffered evidence fully and fairly. A *Penny* claim rejection may also be based on the failure of the evidence relied upon by the petitioner to be constitutionally relevant mitigating evidence. As we find such failure here, we need not and therefore do not consider the ability of the jury to consider under the Texas special issues the evidence pointed to by Madden.

Madden v. Collins, 18 F.3d at 307.

Cole also claims that his "organic neurological deficits" evidence was mitigating but that the jury was unable

to give effect to the evidence. Although such evidence can be considered mitigating, in Cole's case the evidence fails to meet the standard.

In *Graham,* the Fifth Circuit emphasized that *Penry's* evidence "was strongly mitigating because these characteristics were due to the *uniquely severe permanent handicaps* with which the defendant was burdened through no fault of his own, mental retardation, organic brain damage, and an abused childhood" *Graham v. Collins*, 950 F.2d at 1029 (emphasis added). "By imposing the requirement that a handicap be 'uniquely severe,' we acknowledged that not all organic brain damage will establish a *Penry* claim; rather, *organic brain damage is an example of the type of evidence that we require as a minimum* for a challenge under *Penry.*" *Madden v. Collins,* 58 F.3d at 308 (emphasis added).

The evidence is entirely insufficient to prove that Cole did, in fact, suffer from an organic neurological deficit. Testimony from Dr. Jarvis Wright fails to establish that Cole actually suffers from any organic brain damage, let alone that the disorder constitutes a "uniquely severe permanent handicap" to which Cole's criminal act was attributable. *See Davis v. Scott,* 51 F.3d at 460 (requiring a nexus between the handicap and criminal act); *Madden v. Collins,* 18 F.3d at 307 (same).

Even presuming Cole has a central nervous system dysfunction which caused a lack of impulse control and that the lack of impulse control is the cause of Cole's committing capital murder, then he is still not entitled to collateral relief. Noticeably absent from the testimony of any defense witness was evidence that Cole was totally incapable of controlling his impulses. Further no evidence

was produced to prove that Cole was somehow unable to distinguish right from wrong. To the contrary, when asked if Cole "knows right from wrong," Dr. Wright unequivocally answered, "No doubt" Cole thus fails to establish the necessary nexus – that the criminal act was attributable to a "severe permanent handicap." *See Madden v. Collins*, 18 F.3d at 307 (rejecting petitioner's claim that his antisocial personality disorder caused him to be more aggressive or violent and prevented him from understanding the wrongfulness of his actions).

Cole also fails to prove that his alleged neurological deficiency was permanent. Given the fact that defense witnesses testified as to Cole's likelihood for change, there is no evidence to suggest he suffered from any "severe permanent handicap" which might make him less culpable than defendants who have no such excuse. *Madden, supra* (citing *Penry,* 492 U.S. at 319). Consequently, Cole's claim should be rejected as a matter of law because the evidence he relies upon is not constitutionally relevant mitigating evidence. *Madden v. Collins,* 18 F.3d 307 ("A *Penry* claim rejection may also be based on the failure of the evidence relied upon by the petitioner to be constitutionally relevant mitigating evidence.").

Even if Cole's evidence of "destructive family background" and "organic neurological deficits" could be considered constitutionally relevant mitigating evidence, he fails to prove he was entitled to a special jury instruction. In *Graham v. Collins,* the Fifth Circuit held that a special jury instruction was required only if a "major mitigating thrust" of the evidence was substantially beyond the scope of all the special issues. 950 F.2d at 1026-27; *see Barnard v. Collins,* 958 F.2d at 637 (same). Here,

no special jury instructions were necessary because the evidence was not beyond the effective reach of the jury.

Evidence of Cole's destructive family background could be considered under the future dangerousness special issue. *See Madden v. Collins,* 18 F.3d at 304 n.15 (" . . . evidence of Madden's personality disorder, learning disability, and *troubled childhood* were within the effective reach of the jury, as such evidence could be considered by the jury to some extent under one of the special issues – particularly the issue of future dangerousness.") (emphasis added).

Evidence of Cole's organic neurological deficiency could be considered under either the deliberateness or the future dangerousness special issues. Testimony regarding Cole's lack of impulse control was offered to explain the offense and demonstrate a capacity for change through his "outgrowing" the impulsivity over time. The relevance of this evidence to the future dangerousness inquiry of the second issue is readily apparent. *See Franklin v. Lynaugh,* 487 U.S. 164 (1988). In addition, in *Demouchette v. Collins,* the jury was able to give mitigating effect to Demouchette's personality disorder evidence in deciding whether he acted deliberately, the first special issue in Texas. 972 F.2d 651, 653-54 (5th Cir. 1992).

Since Cole cannot prove that the "major mitigating thrust" of his evidence of a destructive family background was substantially beyond the scope of the special issues, he is not entitled to any special jury instruction. *Graham v. Collins,* 950 F.2d at 1026-27; *see Barnard v. Collins*, 958 F.2d at 637 (same).

On state habeas review, the Texas courts found that the punishment-phase instructions did not impermissibly

limit the jury's ability to give effect to Cole's evidence. This conclusion is reasonable in light of the nature of Cole's allegedly mitigating evidence.

Because the Texas courts' rejection of Cole's question of law claim was not unreasonable, Cole is not entitled to federal habeas relief because he cannot prove the state court's rejection of his claim was contrary to established federal law. *Williams v. Taylor,* 120 S.Ct. 1495, 1519 (2000) (to be contrary to established federal law requires that the state court arrive at a conclusion "diametrically" opposed to that reached by the Supreme Court).

In *Robinson v. Johnson,* 151 F.3d 256 (5th Cir. 1998), Robinson claimed in his direct appeal that "the jurors were not able to consider the mitigating effect of his mental disease or defect during the punishment phase of the trial." *Id.* at 264. The trial court had submitted the exact same special issues and instruction as were given in Cole's case. The Fifth Circuit found that "based on the evidence Robinson presented at trial, we conclude that the jury could give mitigating effect to Robinson's evidence of mental illness in answering the second special issue, which concerned Robinson's future dangerousness." *Robinson v. Johnson,* 151 F.3d at 266, citing *Davis v. Scott,* 51 F.3d 457, 464 (explaining that "a **Penry** claim does not arise when constitutionally relevant evidence 'can be given mitigating effect *in some way* under the Texas special issues'") (quoting *Motley v. Collins,* 18 F.3d 1223, 1234 (5th Cir. 1994)) (emphasis in original).

To the extent Cole seeks a special jury instruction even though the evidence was within the effective reach of the jury, then he asks this Court to announce a new rule of

constitutional law in violation of the non-retroactivity doctrine of *Teague v. Lane*, 489 U.S. 288, 310 (1989).

In addition to arguing that the trial court refused his special jury instructions, Cole contends that he requested the court define "deliberately" in the first special issue. To the extent Cole would argue that he was entitled to such a definition, he is foreclosed by circuit precedent, *Woods v. Johnson,* 75 F.3d 1017, 1033-34 (5th Cir. 1996), and barred by *Teague.*

Finally, although Cole alleges that his Sixth Amendment rights were violated, he fails to explain why he believes this is true. Cole is not entitled to habeas relief because "mere conclusory allegations do not raise a constitutional issue in a habeas proceeding." *Ross v. Estelle,* 694 F.2d 1008, 1012 (5th Cir. 1983). *See Blackledge v. Allison,* 431 U.S. 63, 74 (1977) (noting that claims which are "unsupported by specifics are subject to summary dismissal").

CLAIM TWO

The admission of Dr. Richard Coons' improperly obtained testimony regarding future dangerousness violated Mr. Cole's Sixth and Fourteenth Amendment rights

In his second claim for relief, Cole argues that the admission of testimony of psychiatrist Dr. Richard Coons regarding Cole's "future dangerousness" violated his Sixth and Fourteenth Amendment rights.

The trial court records indicate that a pretrial hearing was held on February 2, 1988, wherein Cole's counsel moved for appointment of a psychiatrist so that counsel

could determine whether or not to raise a competency issue. The court granted Cole's request and appointed Dr. Richard Coons, the psychiatrist agreed upon by both sides. Court papers show that other than the brief mention of "competency," the specific parameters of Coons' examination were not delineated by the court at the hearing.

One week later, however, the trial court signed orders for Cole to be temporarily committed to the custody of both Dr. George Parker and Dr. Richard Coons on February 19, 1988, for the purposes of their examining Cole to determine: (1) if he was competent to stand trial; (2) if not, whether there was or was not a substantial probability that Cole would attain competency to stand trial within the foreseeable future; and (3) if, as a result of mental disease or defect, Cole did not know his conduct was wrong at the time he committed the capital offense.

The court ordered the filing of separate written reports concerning "the competency to stand trial and the question of the Defendant's sanity at the time of the alleged offense," as well as a separate report setting forth the examiner's observations and findings concerning whether Cole was mentally ill or mentally retarded.

The court also specifically ordered that prior to the interview, the examiners advise Cole that the examination was conducted pursuant to a court order; that "none of the communications will be privileged"; that a copy of the report will be available to the court, the district attorney, and the defense attorney; and that the examiner "may be required to testify in Court regarding all communications which occur during the examination and interview."

Based solely on the record, it appears Cole's trial attorney was not aware the examination would encompass

future dangerousness. Further, Cole's trial attorney, Bob Spence, signed a sworn affidavit prior to his death, stating that he was not aware that the examination by Coons would encompass future dangerousness.

At Cole's capital murder trial, Dr. Richard Coons testified that prior to conducting any interviews, he advised Cole why the examination was being done; that Cole had the right not to participate in the examination; that none of the communications would be privileged; that a copy of the report would be available to the court, the district attorney, and the defense attorney; and that Dr. Coons "maybe required to testify in court regarding all communications which occurred . . . during the examination and interview."

Dr. Coons also testified that he gave Cole his *Miranda* warnings, that they discussed the warnings, and that later in the examination Dr. Coons reiterated the warnings. He further related that he told Cole that he had the right to have his lawyer present to advise him during the examination; that he had the right to remain silent and that any statement he made could be used in evidence against him.

Dr. Coons further testified that he told Cole that his statements could be used at guilt/innocence not for proving his guilt, but for the purpose of opinions about his competency and sanity. Dr. Coons also testified that he specifically told Cole: "That I could he a witness at the punishment phase of his trial. We discussed the issue about whether – that the jury would be asked to decide whether a defendant – whether there was a probability that the defendant would commit criminal acts of violence in the future which would constitute a continuing threat to society and that that – that I might well be called as a

witness in that regard and that Dr. Parker might be called as a witness in that regard."

Although defense counsel objected once to Dr. Coons' testimony, the sole basis explained for the objection was that "if the *Miranda* warnings have not been given to the defendant, then basically the competency and anything that has been tested by the doctor is not going to be admissible." No objection was ever raised that defense counsel was unaware Dr. Coons' interview would encompass the issue of future dangerousness.

Dr. Coons offered no testimony that Cole ever requested the presence of his attorney or that he refused to participate after being informed that either Dr. Coons or Dr. Parker may be called to testify during punishment regarding future dangerousness.

Thereafter, Dr. Coons testified that he regarded Cole as having "a number of sociopathic antisocial personality features to his personality"; that Cole committed the capital murder with "deliberation" and exhibited "willingness to take the life of another person for financial gain"; that it did not bother Cole that he killed this older man; that the only thing that bothered Cole about the murder was his getting caught and that Cole showed a lack of remorse or lack of conscience for his actions.

Defense witness Dr. Jarvis Wright testified that he thought Cole would be a future danger. For example:

a. "I think if [Cole] were released today on the street, there's a much greater probability of dangerous behavior than with the rest of us . . . I think for [Cole] it's going to be much greater [probability] than for most individuals right now. So I think there's a possibility

of future violence. I don't think there's any way we – I think we'd be foolish to say otherwise. I think we're looking at years from now."

b. Question: "Given [Cole's] background, do you think it's more probable that he would commit those acts [of violence]?"

Answer: "Absolutely."

c. Question: " – Do you feel he's a dangerous person?"

Answer: "Yes."

Question: "Okay. And isn't it a fact that there's a probability that [Cole] would commit criminal acts of violence that would constitute a continuing threat to society in the future?"

Answer: "I think that probability is stronger than for the rest of us, yes."

d. "[Cole] has a greater probability than the rest of us of doing something violent if he's turned loose right now."

e. Question: "And it's very probable that if a person has committed two murders and sexually abused children, that he's going to – it's probable that he's going to continue doing that; isn't that correct, Sir? There's a greater probability that he's going to continue that; is that correct?"

Answer: "He would – yes, there would be a greater probability. Not a very probable, but there would be a – there would be a greater

> likeliness than those of us in the normal population."

In addition, defense witness Dr. Wendel Dickerson agreed that psychiatric tests would support a diagnosis of Cole being a sociopath or psychopath as well as suffering from "an attributive sociative reaction . . . almost a multiple personality kind of thing."

Cole's rights were not violated by the admission of Dr. Richard Coons' testimony regarding future dangerousness.

Cole submitted to the psychiatric examination freely and voluntarily after being fully advised of his rights and of the possible consequences, including the possibility that Dr. Coons might be called to testify at the punishment phase regarding future dangerousness.

Cole has never alleged that he failed to understand or appreciate the significance of the warnings as explained by Dr. Coons. To the contrary, defense witness Dr. Jarvis Wright testified that based on the Wechsler Adult Intelligence Scale, Cole registered a full scale I.Q. score of 121, and a performance I.Q. score of 132 – part of what Wright referred to as Cole's "fantastic raw material." Wright also testified that he found Cole to be "bright, very bright, sizzling bright."

It is entirely possible for a petitioner to waive his right to counsel. Although in *Estelle v. Smith*, the Supreme Court held that the Sixth Amendment is violated if defense counsel is not informed that a psychiatric interview will encompass future dangerousness issues, the Court also wrote that it was not holding that "[Smith] was precluded from waiving this constitutional right." 451 U.S. 454, 471 n.16 (1981). In *Estelle v. Smith*, the psychiatrist

was appointed by the trial court and the examination was conducted without any notice to the defense attorney and without his knowledge.

Given Cole's objective intelligence quotient scores, as well as his voluntary participation in the interview after being fully informed of his constitutional rights including his ability to stop the examination, the Court concludes that Cole waived his Sixth Amendment right to counsel such that Dr. Coons' testimony during the punishment phase did not violate constitutional standards.

Even if Cole did not waive his right to counsel and thus he was denied his Sixth Amendment right to counsel prior to submitting to the psychiatric evaluation, he is still not entitled to collateral relief. The Supreme Court has recognized that both Fifth and Sixth Amendment error in this context is subject to a harmless-error analysis. *Satterwhite v. Texas*, 486 U.S. 249, 257-58 (1988) (*Estelle* error subject to harmless-error analysis because "the effect of the Sixth Amendment violation is limited to the admission into evidence of [the psychiatrist's] testimony"); *Hogue v. Johnson,* 131 F.3d 466, 499 (5th Cir. 1997) (the *Brecht* harmless error analysis is to be applied in a federal habeas proceeding challenging a death penalty); *Barber v. Johnson*, 145 F.3d 234, 236 (5th Cir. 1998); *Woods v. Johnson,* 75 F.3d 1017, 1026-27 (5th Cir. 1996) (*Brecht* harmless error test applied to *Estelle* error); *Vanderbilt v. Collins*, 994 F.2d 189, 198-99 (5th Cir. 1993) (same). The Court in *Brecht v. Abrahamson* held that on federal habeas corpus review of state court convictions, the record must demonstrate that an alleged trial error "actually prejudiced" the petitioner before he is entitled to habeas corpus relief based on the error. 507 U.S. 619, 637 (1993). Even trial

error of constitutional magnitude provides a basis for reversal only if it "had substantial and injurious effect or influence in determining the jury's verdict" *Id., quoting Kotteakos v. United States*, 328 U.S. 750, 776, 66 S.Ct 1239, 1253 (1946).

In the instant case, any error in the admission of Dr. Coons' testimony on future dangerousness was clearly harmless and did not contribute to the verdict obtained. Here, Cole's own expert witnesses, Dr. Jarvis Wright and Dr. Wendel Dickerson, concurred that Cole was a man who showed a probability for future violence. In addition, the State mentioned Dr. Coons only once during closing arguments.

On state habeas review, the Texas courts reasonably presumed that Cole's trial counsel was not aware the psychiatric interview would include the future dangerousness issue and thus Dr. Coons' testimony violated Cole's Sixth Amendment rights, because it was impossible to question counsel in that he had since died in an automobile accident.

The Texas habeas courts then correctly applied controlling federal precedent and found that the admission of Dr. Coons' testimony constituted harmless error:

> In reviewing the harm of Dr. Coons' testimony, the State mentioned Dr. Coons only once during closing argument. Dr. Coons' testimony on future danger issues was not the only testimony about future danger. [Cole's] own witnesses testified at length about the probability that [Cole] would be a danger to society. The complained about testimony of Dr. Coons' [sic] was clearly harmless and did not contribute to the verdict obtained.

The state court determination should be upheld on federal review because Cole fails to prove it is objectively unreasonable under *Williams v. Taylor,* 120 S. Ct. 1495, 1522 (2000), and thus he is not entitled to relief under the AEDPA as a matter of law.

CLAIM THREE

Cole was denied the effective assistance of counsel on direct appeal.

In his third claim, Cole alleges that he was denied his right to effective assistance of counsel on direct appeal because counsel failed raise "a clearly meritorious Sixth Amendment violation" concerning the admission of Dr. Richard Coons' testimony on future dangerousness. He further alleges that "[h]ad appellate counsel raised this issue on direct appeal, [Cole's] death sentence would have been reversed."

The trial court appointed attorneys S. Ancial Middlebrook and Max Parket to represent Cole on direct appeal.

On August 24, 1989, attorney Middlebrook filed an appellate brief raising a single point of error challenging the sufficiency of the evidence supporting Cole's conviction for capital murder.

In his state habeas petition, Cole alleged that his appellate counsel was ineffective for failing to raise three specific points on appeal – (1) that the trial court failed to instruct the jury on mitigating evidence, (2) that Cole's rights were violated by a warrantless search which resulted in illegally obtained evidence and incriminating statements, and (3) that there had been no challenge to

the sufficiency of the evidence supporting an affirmative finding as to the punishment phase second jury issue.

During the state post-conviction proceedings, the State conceded that the performance of Cole's appellate counsel was deficient.

The state trial court found that appellate counsel's performance was deficient, but found that Cole had failed to show that he was prejudiced by such performance.

The Texas Court of Criminal Appeals declined to adopt the trial court's findings that appellate counsel's performance was deficient.

Code did not allege in his state habeas petition that his appellate counsel was ineffective for failing to argue a Sixth Amendment violation based on the admission of Dr. Coons' testimony at punishment.

A criminal defendant is constitutionally entitled to the effective assistance of counsel on direct appeal where the appeal is a matter of right under state law. *Evitts v. Lucey*, 469 U.S. 387 (1985).

Counsel's performance on appeal is measured using the same standards applied to trial counsel under *Strickland v. Washington,* 466 U.S. 668 (1984). Under *Strickland,* Cole must prove that his attorney's performance was deficient and that he was actually prejudiced by counsel's acts or omissions on appeal. *Penson v. Ohio*, 488 US. 75, 84 (1988). Cole "must satisfy both prongs of the *Strickland* test in order to prevail on his claim of ineffective assistance of appellate counsel." *Smith v. Robbins,* 528 U.S. 259, 289 (2000).

The state court's finding that Cole was not prejudiced by appellate counsel's deficient performance is *not* "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d).

Further, Cole was not prejudiced by appellate counsel's failure to raise his Sixth Amendment *Estelle v. Smith* claim on direct appeal. See discussion under Claim Two.

CLAIM FOUR

The trial court prevented Mr. Cole from presenting mitigating evidence concerning his prior convictions and thereby deprived him of protections guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

In his fourth claim, Cole argues that the trial court erroneously excluded relevant mitigating evidence during the punishment phase of his trial in violation of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights. He challenges the exclusion of portions of Nancy Hickey's testimony in which she sought to explain why Cole entered a guilty plea to a previous murder conviction. Cole argues that the Eighth Amendment "commands that a defendant on trial for his life must be permitted the broadest latitude to present evidence that might serve 'as a basis for a sentence less than death.'" (citations omitted).

A review of the state record of transcribed proceedings reveals the following events transpired in regards to Cole's claim. At trial, defense counsel elicited from Ms. Hickey, Cole's mother, that Cole had pleaded guilty to a previous murder charge. Counsel then asked: "Do you know why he

plead 'guilty'?" At this time, the trial court excused the jury from the courtroom before Ms. Hickey could answer.

Outside the presence of the jury, the court stated that "[a]n individual pleads 'guilty' because they are guilty and for no other reason. If any party ever enters a plea other than that, it is an improper plea. The court then asked whether defense counsel was attempting to attack the prior murder conviction, and counsel answered negatively. Counsel then explained that his reason for asking the question was to "show the purpose for the plea of 'guilty,' and that is the fact that he was guilty of shooting Mr. Dedeker." He then stated that he would "like to go into the reason for the shooting."

The trial court pointed out that a stipulation to the evidence of the murder conviction was already admitted into evidence, and the court had "great difficulty" with an attack upon the stipulation. The court explained that any testimony from Ms. Hickey regarding the reason for the shooting is hearsay and therefore not admissible. The court then reasoned that if counsel could give a legitimate reason for admitting the hearsay, it would consider the reason. The court also stated that it wanted counsel "to be able to do the very best you can for your client and put on whatever you believe is necessary for – in your client's interest."

Despite the trial court's willingness to entertain a hearsay exception, Cole's attorney came up with no exception, and thus the court excluded that line of questioning as "rank hearsay."

Here, Cole does not argue that the evidence in question was not, in fact, hearsay. Neither does he point to any

applicable hearsay exception such that the evidence could have been admitted.

The testimony about which Cole complains was properly excluded by the trial court as hearsay, and neither the Eighth nor the Fourteenth Amendment provides justification for this Court to disregard the Texas courts' application of state hearsay rules.

Contrary to Cole's argument that the Eighth Amendment allows for the admission of such testimony, the Supreme Court refused an invitation to "fashion general evidentiary rules, under the guise of interpreting the Eighth Amendment," recognizing that the Fourteenth Amendment is the proper vehicle for evaluating claims of erroneous admission/exclusion of evidence under state law. *Romano v. Oklahoma*, 512 U.S. 1, 6-7 (1994) ("The Eighth Amendment does not establish a federal code of evidence to supersede state evidentiary rules in capital sentencing proceedings").

Cole cites no controlling authority that rules of evidence should be abandoned to allow for the admission of improper hearsay evidence about a defendant's previous convictions. Granting the relief Cole seeks would thus require the court to issue a new rule of constitutional law in violation of the non-retroactivity doctrine of *Teague v. Lane*, 489 U.S. 288, 310 (1989).

Although Cole alleges that his Fifth and Sixth Amendment rights were violated, he entirely fails to explain why he believes these particular rights were abridged. Bald assertions without evidentiary support, such as the instant claim, are wholly insufficient to warrant collateral relief and do not compel federal courts to hold evidentiary hearings. *Ross v. Estelle,* 694 F.2d at 1011.

On state habeas review, the trial court appropriately summarized the testimony and rejected Cole's claim as follows:

> At trial [Cole] attempted to "go behind" his previous murder conviction and explain the circumstances of the killing by putting [Cole's] mother on the stand. The trial court immediately recognized the testimony of the mother to be hearsay, and did not allow it. . . . A careful review of the record does not support [Cole's] position that the trial court prevented [Cole] from presenting mitigating evidence. Instead a review of the record reveals that the trial court was willing to allow defense counsel to present anything that was proper, but would not allow hearsay testimony. No exception to the hearsay rule was cited by defense counsel, which would have allowed the testimony. No evidentiary hearing is needed.

This conclusion was later adopted by the Texas Court of Criminal Appeals when it denied habeas relief. The state court adjudication of the issue was not unreasonable under *Williams v. Taylor,* 120 S. Ct. 1495, 1522 (2000), and thus habeas relief is unwarranted.

CLAIM FIVE

Mr. Cole was denied the effective assistance of counsel at trial, in violation of his rights under the Sixth and Fourteenth Amendments to the United States Constitution

In his final habeas claim, Cole alleges trial counsel was ineffective because "despite his admitted inexperience defending capital cases and his candid acknowledgment that the assistance of co-counsel was necessary," counsel

failed to retain co-counsel after the trial court granted funds for that purpose. Cole also claims that counsel was ineffective because he failed to conduct a reasonable investigation to present and develop mitigating evidence and failed to effectively prepare his defense witnesses to present the mitigating evidence at trial. He also claims that his attorney failed to demand access to adequate investigative resources and to request a continuance in order to permit adequate investigation.

The Supreme Court, in *Strickland v. Washington,* 466 U.S. 668, 687 (1984), established a two-prong standard for ineffective-assistance-of-counsel claims. First, Cole must demonstrate that his counsel's performance was deficient and, second, that the deficient performance prejudiced the defense. To show that the performance was deficient, Cole must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* To show prejudice, Cole must show that his counsel's "errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* Deficient performance will be found to be prejudicial only upon a showing that, but for counsel's errors, there is a reasonable probability that the final result would have been different and that confidence in the reliability of the verdict is undermined. *Lockhart v. Fretwell,* 506 U.S. 364, 369 (1993); *Armstead v. Scott,* 37 F.3d 202, 206-07 (5th Cir. 1994).

"Even a deficient performance does not result in prejudice unless that conduct so undermined the proper functioning of the adversary process that the trial cannot be relied upon has [sic] having produced a just result." *Knox v. Johnson,* 224 F.3d 470, 479 (5th Cir. 2000).

A defendant must show "actual prejudice" as a result of his counsel's deficient performance. *Moody v. Johnson,* 139 F.3d 477, 482 (5th Cir. 1998). Cole is required to show "that the attorney's errors were so deficient as to render the verdict fundamentally unfair or unreliable." *Carter v. Johnson,* 131 F.3d 452, 463 (5th Cir. 1997). This "performance inquiry" is to be made applying a reasonableness standard; i.e., was counsel's assistance reasonable under all the circumstances, making the assessment not in hindsight, but evaluating the conduct from counsel's perspective at the time of the conduct. Thus, the reviewing court is to be highly deferential in scrutinizing counsel's performance. *Strickland,* 466 U.S. at 688-89.

"The failure to prove either deficient performance or actual prejudice forecloses an ineffective assistance claim." *Green v. Johnson,* 160 F.3d 1029 (5th Cir. 1998), *cert. denied,* 525 U.S. 1174 (1999). *See Goodwin v. Johnson,* 132 F.3d 162, 174 (5th Cir. 1997) (stating that the presence or absence of prejudice at either trial or appellate level hinges upon the fairness of the trial and the reliability of the verdict). It is not necessary, however, for a district court to address both requirements of the conjunctive *Strickland* standard when addressing an ineffective-assistance claim; such a claim may be disposed of solely on a petitioner's failure to meet either requirement. *Amos v. Scott,* 61 F.3d 333, 348 (5th Cir. 1995).

A petitioner must of affirmatively prove and not merely allege prejudice. *Mangum v. Hargett,* 67 F.3d 80, 84 (5th Cir. 1995); *Deville v. Whitley,* 21 F.3d 654, 659 (5th Cir. 1994). *See Armstead v. Scott,* 37 F.3d 202, 207 (5th Cir. 1994) (stating that the Fifth Circuit requires an appreciable showing of prejudice).

Conclusory allegations unsupported by any specific facts do not merit a federal court's attention. *Miller v. Johnson,* 200 F.3d 274, 282 (5th Cir. 2000) (citing *Ross v. Estelle,* 694 F.2d 1008, 1013 (5th Cir. 1983)) ("Conclusory allegations of ineffective assistance of counsel do not raise a constitutional issue in a federal habeas proceeding.").

The trial court appointed attorney Bob Spence to represent Cole on January 15, 1988. A trial date was set for May 17, 1988. On March 4, 1988, attorney Spence file [sic] a motion requesting appointment of co-counsel, acknowledging that he "had little experience in capital litigation." Attorney Spence requested the appointment of either Robert McGlasson or Scott Howe – attorneys associated with the Capital Punishment Clinic at the University of Texas School of Law in Austin.

On March 8, 1988, the trial court, rather than appoint co-counsel, authorized attorney Spence to hire co-counsel. On May 5, 1988, at a pretrial hearing, attorney Spence advised the court that no other counsel would be assisting him.

Cole's defense attorney was not ineffective because he did not hire co-counsel.

"An attorney can render effective assistance of counsel even if he has had no prior experience in criminal advocacy." *United States v. Lewis*, 786 F.2d 1278, 1281-82 (5th Cir. 1986) (citing *United States v. Kelley*, 559 F.2d 399, 401 (5th Cir. 1977)); *Yohey v. Collins*, 985 F.2d 222, 228 (5th Cir. 1993). "Whether the defendant has been afforded his right to counsel depends on whether the attorney is reasonably likely to render and does render reasonably effective assistance, not on whether counsel has an extensive background in criminal defense work." *Lewis, supra*

(citing *Herring v. Estelle*, 491 F.2d 125, 126 (5th Cir. 1974)).

Counsel's decision to not pursue appointment of co-counsel should not be reviewed with the benefit of hindsight. *Strickland v. Washington*, 466 U.S. at 689 ("[a] fair assessment of attorney performance requires every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.").

Cole has failed to prove that attorney Spence's failure to hire co-counsel demonstrates deficient performance and that he was prejudiced by counsel's omission as is required by *Strickland*.

Cole's claim that his counsel was ineffective because he failed to conduct an adequate investigation to present and develop mitigating evidence and that counsel failed to effectively pursue and present the mitigating evidence at trial is without merit.

A habeas petitioner has a constitutionally protected right to provide the jury with mitigating evidence that his trial counsel either failed to discover or failed to offer. *Williams v. Taylor*, 120 S. Ct. 1495, 1513 (2000). However, a habeas petitioner must meet both prongs of the *Strickland* standards for judging ineffective-assistance-of-counsel claims.

Cole alleges that attorney Spence failed to demand access to adequate investigative resources; however, he fails to explain or substantiate this claim. Mere speculation of ineffective assistance is not a basis for habeas

relief. *Kinnamon v. Scott,* 40 F.3d 731, 734-35 (5th Cir. 1994).

Cole fails to provide any specific examples or record evidence to substantiate his claim that counsel failed to prepare his punishment phase defense witnesses. Bald assertions without evidentiary support are insufficient to warrant collateral relief. *Ross v. Estelle,* 694 F.2d at 1011. Cole's belief that his counsel spent insufficient time working on his case is without merit. He fails to prove that attorney Spence's representation fell below an objective standard of reasonableness, e.g. that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" as required by *Strickland v. Washington*, 466 U.S. at 687.

Counsel's failure to develop or present mitigating background evidence is not *per se* deficient performance. *See, e.g., Crane v. Johnson*, 178 F.3d 309, 314 (5th Cir. 1999); *Williams v. Cain,* 125 F.3d 269, 277 (5th Cir. 1997).

In order to establish that counsel was rendered ineffective by virtue of a failure to investigate, a convicted defendant must do more that [sic] merely allege a failure to investigate – he must state with specificity what the investigation would have revealed and how it would have altered the outcome of the case. *United States v. Green,* 882 F.2d 999, 1003 (5th Cir. 1989 (citing *Gray v. Lucas,* 677 F.2d at 1093)); *United States v. Lewis,* 786 F.2d 1278, 1283 (5th Cir. 1986); *Alexander v. McCotter,* 775 F.2d 595, 602 (5th Cir. 1985). Here, Cole's general allegations regarding unnamed witnesses fail to warrant habeas relief.

Moreover, even if any investigation would have turned up admissible evidence, that fact is in itself insufficient to

show prejudice. *Gray v. Lucas,* 677 F.2d at 1092. As a result, Cole's broad-based claims of failure to investigate do not entitle him to habeas relief.

An informed decision by counsel not to present family members and friends simply because counsel does not believe they would make a good impression on the jury can be a plausible trial strategy. *See Livingston v. Johnson,* 107 F.3d 297, 308 (5th Cir. 1997).

As in *Kitchens v. Johnson,* 190 F.3d 698 (5th Cir. 1999), Cole's "argument essentially comes down to a matter of degrees. Did counsel investigate enough? Did counsel present enough mitigating evidence? Those questions are even less susceptible to judicial second-guessing." *Id.* at 703.

In determining whether a habeas petitioner was prejudiced for any alleged failure to present mitigating evidence, the Court is

> required to compare the evidence presented at sentencing with all the mitigating evidence contained in the postconviction record. Stated to the point: Is this additional mitigating evidence so compelling that there is a reasonable probability at least one juror could reasonably have determined that, because of [Petitioner's] moral culpability, death was not an appropriate sentence.

Neal v. Johnson, ___ F.3d ___ (5th Cir. Jan. 17, 2000, No. 99-60511).

An examination of the punishment phase testimony from Cole's character witnesses reveals that all of the testimony which Cole now alleges could have been presented

through mitigating witnesses was in fact presented to the jury.

This Court has compared the defense evidence presented during the punishment phase with the evidence Cole alleges could or should have been presented. Cole fails to prove that there is a reasonable probability that one juror could have concluded that death was not an appropriate sentence.

Cole makes general and conclusory allegations of an alleged failure to investigate various aspects of his background, criminal history, and the veracity of his co-defendants. Cole fails to offer any proof to substantiate his claims.

Cole must satisfy both prongs of the *Strickland* standard in order to prevail on his claims of ineffective assistance of counsel. He has failed to meet the *Strickland* standard.

CONCLUSION

Based upon the above findings and conclusions, the Court is of the opinion that the Petition for Writ of Habeas Corpus should be denied. All relief not expressly granted is denied.

SO ORDERED.

Dated March 6, 2001.

/s/ Sam R. Cummings
SAM R. CUMMINGS
United States District Judge

418 F.3d 494

United States Court of Appeals,
Fifth Circuit.

Ted Calvin COLE, now known as Jalil Abdul-Kabir,
Petitioner-Appellant,

v.

Doug DRETKE, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent-Appellee.

No. 01-10646.

July 22, 2005.

Robert Charles Owen (argued), Raoul Dieter Schonemann, Owen & Rountree, Austin, TX, for Cole.

Carla Elaina Eldred (argued), Austin, TX, for Dretke.

Appeal from the United States District Court for the Northern District of Texas.

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Before HIGGINBOTHAM, WIENER, and BARKSDALE, Circuit Judges.

WIENER, Circuit Judge:

This case returns to us on remand from the Supreme Court in light of its recent opinion in *Tennard v. Dretke*.[1] Petitioner-Appellant Ted Calvin Cole argues that a trio of recent cases – *Tennard*, *Smith v. Texas*,[2] and *Bigby v.*

---

[1] 542 U.S. 274, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2003).

[2] 543 U.S. 37, 125 S.Ct. 400, 160 L.Ed.2d 303 (2003).

Dretke[3] – require reversal of the district court's denial of his 28 U.S.C. § 2254 habeas corpus petition and petition for a certificate of appealability ("COA"). Cole asserts that the Texas capital sentencing scheme's special issues did not allow the jury to give "full consideration and full effect" to the mitigating evidence that he presented at the punishment phase of his trial. We reverse the district court's denial of a COA, grant Cole a COA on his *Penry* claim, but ultimately affirm the district court's denial of habeas relief.

I. FACTS AND PROCEEDINGS

In December 1987, Cole was staying at an abandoned motel with his stepbrother, Michael Hickey ("Michael"), and Michael's wife, Kelly Hickey ("Kelly"). Cole mentioned to the Hickeys that he was willing to kill someone to obtain cash. Cole and Michael decided to rob Kelly's grandfather, Raymond Richardson, and then strangle him to death.

Two days after this conversation, Cole, Michael, and Kelly went to Richardson's home and visited with him in his living room for several hours. The group moved to the kitchen. As Richardson left the kitchen, Cole pushed him to the floor, where Richardson landed face down. Cole then sat on Richardson's back and strangled him with a dog leash that the men had brought to the house for this purpose. After Richardson died, the group put his body under his bed. They searched the house for cash, finding twenty dollars in Richardson's wallet. Michael took the cash from the wallet, and Cole took the money to the

[3] 402 F.3d 551 (5th Cir.2005).

grocery store to buy beer and bacon. Cole returned to Richardson's house and shared the groceries with Michael. The morning after the murder, Kelly and Michael surrendered themselves to the police and gave statements. Kelly eventually testified at Cole's trial.

The police arrested Cole at Richardson's home the morning after the murder. Cole gave the police two statements in which he confessed to having murdered Richardson. The statements were introduced against Cole at trial. In one of these statements, Cole admitted that the group decided to strangle Richardson because "it was quiter [sic] then [sic] shooting him and not as messy as cutting his throat and it just seemed the easiest way to do it." The jury found Cole guilty of the capital murder of Richardson while in the course of committing and attempting to commit robbery.

In response to special issues at the end of the penalty phase, the jury answered that (1) Cole had deliberately killed Richardson, and (2) there was a probability that Cole posed a threat of future dangerousness. The trial court accordingly sentenced Cole to death. The Texas Court of Criminal Appeals ("TCCA") affirmed Cole's conviction and sentence, and the United States Supreme Court denied his petition for a writ of certiorari.

Cole filed an application for post-conviction relief in state court, raising, *inter alia,* a *Penry v. Lynaugh*[4] claim. The trial court recommended denying Cole's application, and the TCCA did so.

---

[4] 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) ("*Penry I*"), *abrogated on other grounds, Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002).

Cole then filed a 28 U.S.C. § 2254 habeas corpus petition in the district court, raising six claims, including the *Penry* claim and an ineffective assistance of counsel claim. As to his *Penry* claim, Cole argued in the district court that his mitigating evidence of a "destructive family background" and of "organic neurological defects" – specifically, a lack of impulse control – was "constitutionally relevant mitigating evidence" under our precedent. Cole also argued that Texas's two special issues were not an effective vehicle for the jury to give "full consideration and full effect" to his mitigating evidence.

The district court held that Cole's evidence fell short of our standard for "constitutionally relevant" mitigating evidence. The district court also concluded that, regardless of any possible constitutional relevancy, the mitigating evidence that Cole presented during the penalty phase was fully within the jury's reach given the broad scope of the special issues.[5] The district court ultimately denied all of Cole's claims on the merits. The district court further denied Cole's motion to alter or amend the judgment under Federal Rule of Civil Procedure 59(e) and Cole's motion for a certificate of appealability ("COA").

---

[5] The district court stated:

> Evidence of Cole's destructive family background evidence [sic] could be considered under the future dangerousness special issue.
>
> Evidence of Cole's organic neurological deficiency could be considered under either the deliberateness or the future dangerousness special issues. Testimony regarding Cole's lack of impulse control was offered to explain the offense and demonstrate a capacity for change through his "outgrowing" the impulsivity over time. The relevance of this evidence to the future dangerousness inquiry of the second issue is readily apparent.

Cole appealed the district court's denial of his Section 2254 habeas corpus petition, his motion to alter or amend the judgment, and his application for a COA. We denied Cole's motion for a COA as to his *Penry* claim. We held that reasonable jurists would not debate the district court's conclusion that Cole's evidence was not constitutionally relevant mitigating evidence. Cole asked us to reconsider our denial of a COA on this claim in light of the Supreme Court's grant of certiorari in *Smith v. Dretke*[6] and *Tennard v. Dretke*.[7] We rejected Cole's argument, denied his motion for reconsideration, and ultimately affirmed the district court's denial of Cole's Section 2254 habeas corpus petition.

Cole appealed to the Supreme Court. In light of its opinion in *Tennard,* in which the Supreme Court rejected our "constitutional relevancy" test for mitigating evidence, the Court vacated our panel opinion[8] and remanded for further proceedings consistent with *Tennard.*

DISCUSSION

Section 2253 of the Antiterrorism and Effective Death Penalty Act ("AEDPA") forecloses appeal from a state habeas proceeding unless a circuit justice or judge issues a COA.[9] We may issue a COA "only if the applicant has made a substantial showing of the denial of a constitutional

---

[6] 539 U.S. 986, 124 S.Ct. 46, 156 L.Ed.2d 703 (2003).

[7] 540 U.S. 945, 124 S.Ct. 383, 157 L.Ed.2d 275 (2003).

[8] *Abdul-Kabir v. Dretke,* ___ U.S. ___, 125 S.Ct. 496, 160 L.Ed.2d 368 (2004). Cole changed his name to Jalil Abdul-Kabir when he adopted the Muslim faith.

[9] 28 U.S.C. § 2253(c)(1)(A).

right."[10] To make this showing, Cole must demonstrate that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further."[11]

In determining whether to grant a COA, we are limited "to a threshold inquiry into the underlying merit[s] of [Cole's] claims."[12] This threshold inquiry "does not require full consideration of the factual and legal bases adduced in support of the claims."[13] Instead, we base our determination on "an overview of the claims in the habeas petition and a general assessment of their merits."[14] When the district or state court has imposed the death penalty, "any doubts as to whether a COA should issue must be resolved in [petitioner's] favor."[15]

Cole argues that he is entitled to a COA on his claim that the Texas capital sentencing scheme's two special issues did not allow the jury to give "full consideration and full effect" to the mitigating evidence that he presented at the punishment phase of his trial. Specifically, Cole argues that *Tennard* and *Smith* – as well as our recent opinion in *Bigby* – require reversal of the district court's denial of his

---

[10] *Id.* § 2253(c)(2).

[11] *Miller-El v. Cockrell*, 537 U.S. 322, 327, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003) (citing *Slack v. McDaniel*, 529 U.S. 473, 483, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000)).

[12] *Miller-El*, 537 U.S. at 327, 123 S.Ct. 1029.

[13] *Id.* at 336, 123 S.Ct. 1029.

[14] *Id.*

[15] *Miller v. Dretke*, 404 F.3d 908, 913 (5th Cir.2005) (citing *Hernandez v. Johnson*, 213 F.3d 243, 248 (5th Cir.2000)).

Section 2254 habeas corpus petition and request for a COA.

Texas's capital punishment scheme must meet two requirements to comply with the Eighth Amendment. First, it must "channel the discretion of judges and juries to ensure that death sentences are not meted out wantonly or freakishly."[16] Second, it must "confer sufficient discretion on the sentencing body to consider the character and record of the individual offender."[17] Accordingly, any relevant mitigating evidence "cannot be placed beyond the effective reach of the jury."[18] To prevail on a *Penry* claim, Cole must demonstrate that (1) the mitigating evidence adduced at the penalty phase of his trial meets the "low threshold for relevance;"[19] and, if so, (2) the evidence was beyond the effective reach of the jury.[20]

Before *Tennard,* to demonstrate that evidence was constitutionally relevant and mitigating, we required a petitioner to show that (1) he had a "uniquely severe permanent handicap" acquired through no fault of his own, and (2) there was a nexus between the offense and the petitioner's "severe permanent condition."[21] In our original panel opinion, we held that Cole had failed to

---

[16] *Graham v. Collins,* 506 U.S. 461, 468, 113 S.Ct. 892, 122 L.Ed.2d 260 (1993).

[17] *Bigby,* 402 F.3d at 564 (citing *Graham,* 506 U.S. at 468, 113 S.Ct. 892).

[18] *Id.* (citing *Graham,* 506 U.S. at 475, 113 S.Ct. 892).

[19] *Tennard,* 124 S.Ct. at 2570.

[20] *See Bigby,* 402 F.3d at 564-65; *Madden v. Collins,* 18 F.3d 304, 308 (5th Cir.1994).

[21] *Davis v. Scott,* 51 F.3d 457, 460-61 (5th Cir.1995), *overruled in part by Tennard,* 124 S.Ct. at 2569-70.

demonstrate "that jurists of reason could debate the correctness of the district court's determination that the nexus requirement applie[d] to his *Penry* claim."

In *Tennard*, the Supreme Court explicitly rejected our "constitutional relevance" test.[22] The *Tennard* court stated:

> The Fifth Circuit's test has no foundation in the decisions of this Court. Neither *Penry I* nor its progeny screened mitigating evidence for "constitutional relevance" before considering whether the jury instructions comported with the Eighth Amendment. Indeed, the mitigating evidence presented in *Penry I* was *concededly* relevant so even if limiting principles regarding relevance were suggested in our opinion – and we do not think they were – they could not have been material to the holding.[23]

The *Tennard* Court also clarified the standard for relevant mitigating evidence:

> We established that the meaning of relevance is no different in the context of mitigating evidence introduced in a capital sentencing proceeding than in any other context, and thus the general evidentiary standard – any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence – applies.[24]

---

[22] 124 S.Ct. at 2570.

[23] *Id.* (emphasis in original) (citations omitted).

[24] *Id.* (citing *McKoy v. North Carolina*, 494 U.S. 433, 440-41, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990)) (quotations omitted).

Because we relied on the "nexus" requirement to deny Cole a COA on his *Penry I* claim, and because the district court relied – at least in part – on our now-defunct test, we hold that jurists of reason could debate whether Cole's mitigating evidence is relevant. Accordingly, we grant Cole a COA on this claim.

1. Relevant Mitigating Evidence

We must first determine whether Cole's mitigating evidence meets the low threshold for relevance as articulated by the *Tennard* Court.[25] The district court correctly classified Cole's mother's testimony of a destructive family background as follows:

> A. Cole's mother was an alcoholic who was unable to care for her children.
>
> B. Cole's father was arrested for trying to rob a liquor store.
>
> C. Cole's father deserted the family when Cole was five years old.[26]
>
> D. Cole's mother then moved with her children to her parents' home.
>
> E. Cole's grandparents were alcoholics who did not want the children to live with them.

---

[25] 124 S.Ct. at 2570.

[26] Cole's mother testified as to the last time Cole saw his father:

> The last time he saw his father, his father brought him to San Angelo. He had took [sic] him off to Abilene and brought him in [sic] San Angelo and dropped him off a block from where he thought I lived and said, "Your mother lives down in that block. Go find her," and drove off. That's the last time he had seen [sic] his father.

F. Cole was isolated from other children because his grandparents' home was eight miles out of town.

G. School buses did not run to the grandparents' home, and the grandparents did not allow Cole's mother to use their car to take Cole to school.

H. Cole was placed in a children's home at the age of five.

I. During Cole's five years in the home, his mother visited him only twice.

J. Cole's father never visited him at the home.

K. Cole's uncle adopted Cole's brother, but not Cole.

Dr. Jarvis Wright, a psychologist who administered a battery of psychological and neuropsychological tests to Cole, testified at Cole's punishment phase that Cole had a "very rugged, rough childhood," that he experienced "a bad, very painful background," and that he "never felt loved and worthwhile in his life." Dr. Wright stated that Cole had repressed many of the memories of his turbulent childhood. Dr. Wright also testified that Cole's family background led him to experience "terrific needs for nurturance," a "fragmented personality," and "chronic depression." He stated that while awaiting trial, Cole was so "distressed" and "distraught" that he tried to commit suicide by cutting his own throat.

The district court rejected Cole's "family background" evidence as relevant mitigating evidence because "[n]o testimony was presented that these events caused any type of psychological effect on Cole" and "Cole fail[ed] to

show that his commission of capital murder was in any way attributable to his 'destructive family background.'"

Given the low threshold for relevant mitigating evidence articulated by the *Tennard* Court, we find that evidence of Cole's turbulent family background constitutes relevant mitigating evidence. Cole need not show that any psychological condition caused by his destructive family background is linked to his conduct; he need only show that it existed, and that a jury could find that a sentence other than death would be warranted.[27] The district court erred when it rejected Cole's evidence of a destructive family background under the "nexus" test expressly rejected by the Supreme Court in *Tennard*. The Supreme Court itself has sanctioned evidence of family history and emotional disturbance as relevant mitigating evidence.[28]

We also conclude that Cole's evidence of "organic neurological deficiency"– specifically, a lack of impulse control – is relevant mitigating evidence. Dr. Wright explicitly testified that Cole suffered from diminished impulse control. He stated:

---

[27] *See Tennard*, 124 S.Ct. at 2570; *see also Skipper v. South Carolina*, 476 U.S. 1, 5, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986) (holding that evidence of a defendant's good conduct in jail, while not related specifically to his culpability for the crime that he committed, must be allowed before the jury because "such evidence would be mitigating in the sense that it might serve as a basis for a sentence less than death").

[28] *See, e.g., Eddings v. Oklahoma*, 455 U.S. 104, 115, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) ("Nor do we doubt that the evidence Eddings offered was relevant mitigating evidence . . . Evidence of a difficult family history and of emotional disturbance is typically introduced by defendants in mitigation.").

> Ted[29] lacks a great deal of impulse control. And I think that's important in these tests I gave. . . . It indicates some central nervous damage or very likely central nervous damage. Combine that and all the other factors of Ted's background, all these other things, we're going to have an individual with some real problems with impulse control.[30]

Dr. Wright also stated that the combination of Cole's destructive childhood of neglect and abandonment had impaired his judgment and his ability to control his behavior. According to Dr. Wright, Cole learned to cope with reality by living in a "fantasy" world. Dr. Wright testified that although Cole started out in life with "fantastic raw material," the abandonment, neglect, and mistreatment that he suffered as a child left his personality "very damaged" and "horribly" distorted.

The district court rejected Cole's evidence of organic neurological deficiency because the "[t]estimony from Dr. Jarvis Wright fail[ed] to establish that Cole actually suffers from any organic brain damage, let alone that the disorder constitutes a 'uniquely severe handicap' to which Cole's criminal act was attributable."[31] Because it relied on

---

[29] "Ted" refers to Cole in the direct citations from the record.

[30] Although Cole scored in the bottom five per cent of the population on some of the tests, he scored a 132 on an I.Q. test.

[31] The district court also rejected Cole's evidence of organic neurological deficiency as relevant mitigating evidence because the "evidence [was] entirely insufficient to prove that Cole did, in fact, suffer from an organic neurological deficit." As noted above, however, because the district court applied an improper test to screen the mitigating evidence, it erred. Further, it is within the sentencer's province to accord the appropriate weight to any mitigating evidence. *See, e.g., Shannon v. State,* 942 S.W.2d 591, 597 (Tex.Crim.App.1996)

(Continued on following page)

a test that the Supreme Court has "never countenanced" and has now "unequivocally rejected," the district court "'assessed [Cole's] claim under an improper legal standard.'"[32] That Cole's evidence was relevant for purposes of mitigation is now clear under current Supreme Court precedent.[33]

2. Jury Instructions

With that background to establish the framework of our analysis, we turn to the principal issue in dispute – whether, at the punishment phase of his trial, Texas's special issues allowed Cole's jury to give full consideration and effect to the evidence of destructive family background and organic neurological deficiency. Cole argues that a COA should issue because reasonable jurists could disagree with the district court's conclusion that his relevant mitigating evidence was not beyond the effective reach of the jury. In light of the Supreme Court's opinion in *Smith* and our recent opinion in *Bigby,* we conclude that jurists of

---

("Instead, jurors must individually determine what evidence, if any, mitigates against the imposition of the death penalty, and what weight, if any, to give that evidence in its consideration."). Because any possible organic deficiency could weigh against a death sentence, it is relevant mitigating evidence under *Tennard.*

[32] *Smith,* 125 S.Ct. at 405.

[33] *See Lockett v. Ohio,* 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) ("[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor, any aspect of a defendant's character* or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (emphasis in original and added)); *see also Tennard,* 124 S.Ct. at 2573 ("Impaired intellectual functioning is inherently mitigating.") (citing *Atkins v. Virginia,* 536 U.S. 304, 316, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002)).

reason could debate the district court's conclusion that Cole's mitigating evidence was not beyond the effective reach of the jury. Accordingly, we reach the merits of Cole's claim.

At the end of the punishment phase of the trial, the state trial court instructed the jury to consider two special issues pursuant to Texas Code of Criminal Procedure article 37.071(2)(b):

> (1) Was the conduct of the defendant, TED CALVIN COLE, that caused the death of the deceased, RAYMOND C. RICHARDSON, committed deliberately and with the reasonable expectation that the death of the deceased or another would result?
>
> (2) Is there a probability that the defendant, TED CALVIN COLE, would commit criminal acts of violence that would constitute a continuing threat to society?

The jury charge also contained the following supplemental instruction:

> You are further instructed that in determining each of these Special Issues you may take into consideration all of the evidence submitted to you in the full trial of this case, that is, all of the evidence submitted to you in the first part of this case wherein you were called upon to determine the guilt or innocence of the defendant, and all of the evidence, if any, admitted before you in the second part of the trial wherein you are called upon to determine the answers to the Special Issues hereby submitted to you.

Cole contends that, in violation of *Penry I*, the two special issues "shackled and confined" the jury's consideration of

his mitigating evidence and provided no vehicle for the jury to give it full mitigating effect.

At the punishment phase of the trial in *Penry I,* the defense presented mitigating evidence of Penry's mental retardation and severe physical abuse. At the conclusion of the penalty phase, the trial court instructed the jury to consider the two special issues that we address here.[34] The jury answered "yes" to the special issues, and the trial court sentenced Penry to death.

In the Supreme Court, Penry argued that Texas's special issues did not allow the jury to give consideration and effect to his mitigating evidence. The Court agreed, holding that "in certain cases Texas'[s] statutory special issues, as applied, d[o] not give the jury sufficient opportunity to consider and give effect to the mitigation evidence without appropriate additional instructions."[35] Thus, when the mitigating evidence offered by the defendant (1) is not relevant to the special issues, or (2) is beyond the scope of the special issues, and "the jury [is] otherwise unable to express its reasoned moral response to that evidence in rendering its sentencing decision," the sentencing court must provide the jury with additional instructions to inform it that it may consider and give effect to a defendant's mitigating evidence.[36]

---

[34] The *Penry I* trial court also instructed the jury to consider a third special issue – whether the defendant's conduct was an unreasonable response to any provocation by the victim – which is not at issue here.

[35] *Bigby,* 402 F.3d at 568 (citing *Penry I,* 492 U.S. at 318, 109 S.Ct. 2934).

[36] *Id.*

At Penry's retrial, on remand from the Supreme Court, the state court instructed the jury to answer the special issues but included a supplemental instruction that the jury was to consider any mitigating evidence offered by Penry during the punishment phase:

> If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and therefore, give effect and consideration to them in assessing the defendant's personal culpability *at the time you answer the special issues.* If you determine, when giving effect to the mitigation evidence, if any, that a life sentence, *as reflected by a negative finding to the issue under consideration,* rather than a death sentence, is an appropriate response to the personal culpability of the defendant, *a negative finding should be given to one of the special issues.*[37]

The jury again found Penry guilty, he was again sentenced to death, and he again appealed.

The Supreme Court held that the trial court's supplemental instruction was "an inadequate vehicle for the jury to make a reasoned moral response to Penry's mitigating evidence."[38] The Court first clarified that

> *Penry I* did not hold that the mere mention of "mitigating circumstances" to a capital sentencing jury satisfies the Eighth Amendment. Nor does it stand for the proposition that it is constitutionally sufficient to inform the jury that it

---

[37] *Penry v. Johnson* ("*Penry II*"), 532 U.S. 782, 797-98, 121 S.Ct. 1910, 150 L.Ed.2d 9 (2001) (emphasis in original) (quoting trial court).

[38] *Id.* at 790, 121 S.Ct. 1910.

> may "consider" mitigating circumstances in deciding the appropriate sentence. Rather, the key to *Penry I* is that the jury be able to "consider and *give effect to* [a defendant's mitigating] evidence in imposing sentence."[39]

Concentrating on the italicized language in the state court's supplemental instruction, the Court found the instruction constitutionally inadequate because "the jury's ability to consider and give effect to Penry's mitigating evidence was still 'shackled and confined within the scope of the three special issues,'"[40] which were not broad enough to encompass Penry's evidence of mental retardation and childhood abuse.

The Court also explained that even if the supplemental instruction and verdict form had allowed the jury to respond in the negative to one of the special issues and thereby avoid sentencing Penry to death, it "would have been both logically and ethically impossible for a juror to follow both sets of instructions," i.e., the special issues instructions and the supplemental instruction.[41] The Court reasoned:

> Because Penry's mitigating evidence did not fit within the scope of the special issues, answering those issues in the manner prescribed on the verdict form necessarily meant ignoring the command of the supplemental instruction. And answering the special issues in the mode prescribed by the

---

[39] *Id.* at 797, 121 S.Ct. 1910 (citations omitted) (alteration and emphasis in original).

[40] *Id.* at 798, 121 S.Ct. 1910 (quoting *Penry v. Johnson*, 215 F.3d 504, 514 (5th Cir.2000) (Dennis, J., dissenting)).

[41] *Id.* at 799, 121 S.Ct. 1910.

> supplemental instruction necessarily meant ignoring the verdict form instructions. Indeed, jurors who wanted to answer one of the special issues falsely to give effect to the mitigating evidence would have had to violate their oath to render a "'true verdict.'"[42]

The supplemental instruction thus inserted "an element of capriciousness" into the jury's sentencing decision, because a juror would have had to be willing to elevate the supplemental instruction over the verdict form instruction.[43] The Court also concluded that "a clearly drafted catchall instruction on mitigating evidence ... might have complied with *Penry I*," specifically noting that Texas's current capital sentencing scheme now includes such a catchall provision.[44]

In *Smith v. Texas,* the Supreme Court confronted jury instructions similar to those in *Penry II* and again held the

---

[42] *Id.* at 799-800, 121 S.Ct. 1910.

[43] *Id.* at 800, 121 S.Ct. 1910.

[44] *Id.* The current Texas statutory scheme provides:

> The court shall instruct the jury that if the jury returns an affirmative finding to each issue submitted under Subsection (b) of this article [the special issues subsection], it shall answer the following issue:
>
> > Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.

Tex.Code Crim P. art. 37.071(2)(e)(1).

instructions unconstitutional.[45] The Court first held that the special issues were not broad enough to encompass Smith's evidence of organic learning disabilities and speech handicaps, a low IQ, and a drug-addicted criminal father.[46] Although the *Smith* instructions were not identical to those in *Penry II,* the Court found any difference constitutionally insignificant because, as we noted in *Bigby,* the *Smith* jury still "faced . . . the ethical dilemma of either answering the special issue questions in a manner prescribed on the verdict form and ignoring the supplemental instruction, or answering the questions as prescribed by

---

[45] 543 U.S. 37, 125 S.Ct. 400, 160 L.Ed.2d 303 (2004). The supplemental instruction in *Smith* read as follows:

> You are instructed that you shall consider any evidence which, in your opinion, is mitigating . . . . You may hear evidence which, in your judgment, has no relationship to any of the Special Issues, but if you find such evidence is mitigating under these instructions, you shall consider it in the following instructions of the Court. You, and each of you, are the sole judges of what evidence, if any, is mitigating and how much weight, if any, the mitigating circumstances, if any, including those which have no relationship to any of the Special Issues, deserves. In answering the Special Issues submitted to you herein, if you believe that the State has proved beyond a reasonable doubt that the answers to the Special Issues are "Yes," and you also believe from the mitigating evidence, if any, that the Defendants should not be sentenced to death, then you shall answer at least one of the Special Issues "No" in order to give effect to your belief that the death penalty should not be imposed due to the mitigating evidence presented to you. In this regard, you are further instructed that the State of Texas must prove beyond a reasonable doubt that the death sentence should be imposed despite the mitigating evidence, if any, admitted before you.

Id. at 402-03.

[46] *Id.* at 407.

the supplemental instruction which necessarily meant ignoring the verdict form."[47] The Court concluded that the supplemental instruction unconstitutionally shackled the jury's consideration of Smith's mitigating evidence to the special issues.[48]

With this in mind, we address Cole's claim that *Penry I, Penry II, Tennard*, and *Smith* require reversal of the district court's denial of his habeas application. Cole contends that the special issues are not broad enough to encompass his mitigating evidence of a destructive family background and an organic neurological deficiency, including diminished impulse control. Specifically, Cole argues that the two special issues do not provide an adequate vehicle for the jury to consider his mitigating evidence. As the Supreme Court has expressly limited *Penry I*'s application to cases in which "the constitutional defect lay in the fact that relevant mitigating evidence [is] placed beyond the effective reach of the sentencer,"[49] we must first determine whether the special issues are broad enough to encompass Cole's mitigating evidence. We conclude that they are.

Cole's reliance on *Penry I, Penry II, Tennard*, and *Smith* is misplaced. *Penry I* and *II* are readily distinguishable from this case. In *Johnson v. Texas*,[50] the Supreme Court confirmed the limited scope of *Penry I* and *II*. Although the defendant in *Johnson* insisted that the Texas special

---

[47] *Bigby*, 402 F.3d at 570.

[48] *See id.* at 572.

[49] *Graham*, 506 U.S. at 475, 113 S.Ct. 892; *see Bigby*, 402 F.3d at 570.

[50] 509 U.S. 350, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993).

issues prevented the jury from considering the mitigating effect of his youth,[51] the Court rejected that argument and, in doing so, clarified *Penry*'s scope.

In *Johnson,* the Court explained that in *Penry,* "there was expert medical testimony that the defendant was mentally retarded and that his condition prevented him from learning from his mistakes."[52] As the expert testimony intimated that Penry was unable to learn from his mistakes, the *Johnson* Court concluded that the only logical manner in which Penry's jury could have considered the evidence of his mental retardation under the future dangerousness special issue was as an *aggravating* factor: Penry would remain a danger in the future because there was no chance that he would ever understand that rape and murder were wrong.[53] Thus, Penry's jury was unable to give any mitigating effect to the mental retardation evidence that he proffered.

Here, however, the mitigating evidence of Cole's destructive family background and organic neurological deficiency falls outside of *Penry*'s holding. With regard to Cole's mitigating evidence of "organic deficiency," the testimony proffered by two of Cole's own expert witnesses is directly contrary to the testimony at Penry's penalty phase that the *Penry* Court found aggravating. In response to direct questions on Cole's future dangerousness, Dr. Wright provided the following testimony:

---

[51] *See id.* at 368, 113 S.Ct. 2658.

[52] *Id.* at 369, 113 S.Ct. 2658 (citing *Penry I,* 492 U.S. at 308-09, 109 S.Ct. 2934).

[53] *See id.* (citing *Penry I,* 492 U.S. at 323, 109 S.Ct. 2934).

I think the research certainly indicates that individuals like Ted, individuals who have had this kind of background, tend to begin making changes at about forty, forty-five, fifty, somewhere in there. They tend to mellow a bit and change a good bit. You can infer that from some of the FBI statistics on age and changes in persons.

But I think as we see him age, get older, hormones change, the process of aging takes over, as it does in all of us – and we all change. I think the evidence is overwhelming there that individuals who have behaved as he has change. They burn out. And I think there's a good chance of later in life – not now, but later in life – some changes.

I'm suggesting that, as we grow older, we change; the compass points a different direction. We're tired. We're – we're – our goals, our orientation is different. The research indicates that – that this is the case with individuals who commit violent or antisocial acts.

We also know from probabilities that, as people grow older, the probability of them becoming involved in violent acts decreases to the point of fifty, where the FBI statistics would indicate that they're almost – it almost doesn't happen. These behaviors have almost burned out of individuals. While they may be flaming while they're younger, they burn out later. So I don't have any specific statements for Ted as an individual. That would take a crystal ball. But for Ted as a – as a human being, we know this happens to human beings who are like Ted, who have histories like Ted. We know from statistics that they change, as we do all change.

Dr. Wright also testified that even though Cole's diary demonstrated a "fantasy" to behave like a "modern-day Viking" or a "pirate," Cole was unlikely to act on such fantasies because he did not have the "wherewithal" to do so.

The former chief mental health officer for the Texas Department of Corrections, Wendel L. Dickerson, Ph.D., also testified on Cole's behalf. Dr. Dickerson first explained the process behind "predicting future behavior and future violent conduct in particular." He then testified:

> . . . on the basis of the statistical data available to use, that diagnosis would necessarily apply five, ten, fifteen years from now. I mean, whatever condition he is suffering from is not necessarily immutable and unchangeable. I mean it can be changed – I mean, time changes – I mean – and experience changes people. Changes in body changes people.
>
> Old person gets older. Their hormones change. The brain changes. So it's – I mean, just because he's dangerous – if he's considered dangerous today, does not necessarily mean he's going to be dangerous at some future point in time.

In addition, although the State's expert witness testified that Cole would remain a danger as long as he lived, Dr. Dickerson attempted to rebut this testimony:

> Whenever we assert that someone is dangerous, we're saying that he's more likely to actually act out. However, when we reach that diagnosis – it's been demonstrated in study after study that that diagnosis actually leads to – is followed by violent conduct only about one in three times. So you're wrong – whenever you say somebody is

> dangerous, say he's going to do something violent or aggressive, you're going to be wrong about twice as often as you're – as you're right.

Unlike the evidence in *Penry,* Cole's mitigating evidence did not suggest that he was unable to learn from his mistakes. The record does not suggest that the jury viewed Cole's mitigating evidence as an aggravating factor only, i.e., because he cannot learn from his mistakes, he will remain a danger in the future. Rather, the evidence proffered by Cole's expert witnesses suggested to the jury that Cole could change in the future.[54] The evidence intimated that someone from Cole's abusive background begins to change later in life. This evidence also suggests that even someone with a lower than normal IQ or an organic neurological deficiency changes later in life. That this evidence fits well within the broad scope of the future

---

[54] This testimony also distinguishes Cole's case from Bigby's. In *Bigby,* the panel relied heavily on testimony that Bigby's schizophrenia "cannot be adequately controlled or treated." 402 F.3d at 571. As with Penry's evidence that he was unable to learn from his mistakes, Bigby's mitigation evidence contained the same "double-edged sword" as Penry's. *See id.* Because Bigby's schizophrenia could not be controlled or treated, the jury could have considered it an aggravating factor under the future dangerousness issue. *See id.*

At oral argument, counsel for the state conceded that the mitigating evidence that Cole presented at trial could perhaps be a double-edged sword. We do not, however, read *Penry I* and *Bigby* to stand for the broad proposition that any evidence that the jury may deem either mitigating or aggravating can not be given effect under *Penry I.* As we noted above, a jury can not [sic] give mitigating effect to evidence that can be seen as aggravating *only. See Penry I,* 492 U.S. at 323 ("Although this [mental retardation] evidence is relevant to the second issue, it is relevant *only* as an *aggravating* factor because it suggests a 'yes' answer to the question of future dangerousness." (emphasis in original and added)). Here, on the contrary, Cole's mitigating evidence does not suggest *only* a "yes" answer to the future dangerousness issue.

dangerousness special issue is clearly evident from the testimony of Cole's own expert witnesses.

Further, the Supreme Court itself has indicated that "family background" evidence falls within the broad scope of Texas's special issues. In *Graham,* the Court stated:

> Moreover, we are not convinced that *Penry* could be extended to cover the sorts of mitigating evidence Graham suggests without a wholesale abandonment of *Jurek* and perhaps also of *Franklin v. Lynaugh.* As we have noted, *Jurek* is reasonably read as holding that the circumstance of youth is given constitutionally adequate consideration in deciding the special issues. *We see no reason to regard the circumstances of Graham's family background and positive character traits in a different light.* Graham's evidence of transient upbringing and otherwise nonviolent character more closely resembles Jurek's evidence of age, employment history, and familial ties than it does Penry's evidence of mental retardation and harsh physical abuse.[55]

The Supreme Court has drawn a significant distinction between the type of evidence that Penry presented at his trial and the evidence that Cole presented at his, which falls within the scope of Texas's special issues.

As the district court correctly concluded in its alternative analysis, Cole's mitigating evidence falls within the scope of the special issues. Specifically, the jury could have considered Cole's family background and organic deficiency evidence under – at the least – the future dangerousness

---

[55] *Graham,* 506 U.S. at 476, 113 S.Ct. 892 (emphasis added).

special issue. Given the experts' testimony during the punishment phase, the jury could have believed them and found that, although Cole suffered a turbulent childhood and may suffer from diminished impulse control, he is capable of change and thus would not necessarily remain a danger in the future.

Neither *Tennard* nor *Smith* changes *Johnson*'s analysis of *Penry,* or the result that we reach today. As we have explained, the principal concern of the Court in *Tennard* was our constitutional relevancy test, on which we relied to affirm the denial of Cole's habeas corpus petition. Whether the mitigating evidence that Tennard presented at the punishment phase of his trial fit within the scope of the special issues was of only secondary concern to the Court.[56] What mattered in *Tennard* was that under our constitutional relevancy test, most mitigating evidence would have been "screened out" before a court would ever have considered whether the evidence fell within the scope of the special issues.[57]

Further, explained the *Tennard* Court, our court should have answered the following question: "Has Tennard 'demonstrated that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong?'"[58] In conducting this analysis, the Court held that "[i]mpaired intellectual functioning has mitigating dimension beyond the impact it has on the

---

[56] Indeed, the Court devoted only the last paragraph of the opinion to the dispute present here. *See Tennard,* 124 S.Ct. at 2572-73.

[57] *See id.* at 2571.

[58] *Id.* at 2572 (citing *Slack v. McDaniel,* 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000)).

individual's ability to act deliberately."[59] It also stated that "[a] reasonable jurist could conclude that the jury might well have given Tennard's low IQ evidence aggravating effect in considering his future dangerousness, not only as a matter of probable inference from the evidence but also because the prosecutor told them to do so. . . ."[60]

The situation here is distinguishable from that in *Tennard*. We recognize that the trial court failed to define "deliberately" with respect to the first special issue,[61] but we cannot conclude that the jury could have given Cole's mitigating evidence an aggravating effect. The state prosecutor did not ask the jury to consider Cole's mitigating evidence as aggravating. Neither did he "press[] exactly the most problematic interpretation of the special issues, suggesting that [Cole]'s low IQ was irrelevant in mitigation, but relevant to the question whether he posed a future danger."[62] Accordingly, Cole's prosecutor here did not place the jurors in the ethical dilemma of responding falsely to a special issue. And, as we explained above, under the instructions it was given, the jury could have considered and given effect to Cole's mitigating evidence under the future dangerousness special issue.

---

[59] *Id.* at 2572 (citing *Penry I*, 492 U.S. at 322, 109 S.Ct. 2934).

[60] *Id.* The prosecutor stated, "[W]hether he has a low IQ or not is not really the issue. Because the legislature, in asking you to address that question, the reasons why he became a danger are not really relevant. The fact that he is a danger, that the evidence shows he's a danger is the criteria to use in answering that question." *Id.* (alteration in original).

[61] *See Penry II*, 532 U.S. at 803, 121 S.Ct. 1910.

[62] *Tennard*, 124 S.Ct. at 2572.

Neither does *Smith* require a different result. In *Smith,* the Court held that the state trial court's "nullification instruction" was constitutionally inadequate to provide the jury with an effective vehicle to consider Smith's mitigating evidence of low IQ, youth, and family background.[63] The Court concluded that the mandatory language in the charge "could possibly have intensified the dilemma faced by ethical jurors."[64] The Court noted that, just as in *Penry II,* the *Smith* jurors were faced with having to voice a false answer to a special issue – a special issue that they had sworn to uphold if the prosecution proved it beyond a reasonable doubt – to avoid the death penalty.[65]

Here, however, the supplemental instruction[66] is distinguishable from the one given at either Smith's or Penry's trial.[67] In *Boyde v. California,*[68] the Supreme Court

---

[63] 125 S.Ct. at 406-07.

[64] *Id.* at 407. In *Smith,* the Court noted that the trial court instructed the jury that if "you also believe from the mitigating evidence, if any, that the Defendant should not be sentenced to death, then you *shall* answer at least one of the Special Issues 'No'. . . ." *Id.* at 403 (emphasis added) (quoting trial court). For the full instruction, *see supra* note 45.

[65] *See id.*

[66] Cole contends that the supplemental instruction is a "nullification instruction," similar to those struck down as unconstitutional in both *Smith* and *Penry.* We do not find that this is so. The trial court's supplemental instruction did not "direct[] the jury to give effect to mitigation evidence, but allow[] the jury to do so only by negating what would be affirmative responses to two special issues relating to deliberateness and future dangerousness." *Id.* at 401. The supplemental instruction here merely instructed the jury to *consider* the mitigating evidence when deciding the special issues.

[67] For a full quotation of the instruction, *see supra* page 502-03.

[68] 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990).

delineated the standard under which we assess whether the jury instructions allowed the jury to consider and give effect to a defendant's mitigating evidence. There, the Court held that a reviewing court must determine "whether there is a *reasonable likelihood* that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence."[69] "Although the reasonable likelihood standard does not require that the defendant prove that it was more likely than not that the jury was prevented from giving effect to the evidence, the standard requires more than the mere possibility of such a bar."[70] To evaluate the instructions, we do not "engage in a technical parsing" of the language in the instructions, but instead "approach the instructions in that same way that the jury would – with a 'commonsense understanding of the instructions in the light of all that has taken place at the trial.'"[71]

The Supreme Court has upheld the use of this instruction – almost word for word – in *Johnson v. Texas,* in which it held that Texas's special issues were broad enough to encompass mitigating evidence of youth.[72] The difference in the language of the instruction upheld in *Johnson* and that struck down in *Penry II* and *Smith* is instructive. Whereas the instructions in *Smith* and *Penry II* specifically tied an answer to the special issues to the mitigating evidence, the instruction in *Johnson* merely instructed the jury to consider all of the evidence when

---

[69] *Id.* at 380, 110 S.Ct. 1190 (emphasis added).

[70] *Id.*

[71] *Johnson v. Texas,* 509 U.S. 350, 368, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993) (quoting *Boyde,* 494 U.S. at 381, 110 S.Ct. 1190).

[72] 509 U.S. at 355, 113 S.Ct. 2658.

answering the special issues. The import of the Supreme Court's focus on state trial court nullification instructions (which, as we note above, we do not have here) is to determine whether the jury was given conflicting duties, viz., to answer the special issues "yes" if the prosecution proves them beyond a reasonable doubt but to respond negatively to one of them (even if proven beyond a reasonable doubt) if the mitigating evidence demonstrates that the defendant does not merit a sentence of death, thereby violating their oath to respond truthfully to the special issues. The ethical dilemma in which the conflicting instructions place the jury constitute the constitutional violation.

We are not presented with that situation here. As in *Johnson,* Cole's state trial court instructed the jury to consider *all* of the evidence – from the guilt and punishment phases – when it responded to the special issues. The trial court used no mandatory language, instead instructing the jury that it "may" consider all of the evidence. Further, the instruction here did not specifically tie an answer to a special issue to the mitigating evidence.[73] Accordingly, the state trial court did not deliver conflicting instructions that would place the jurors in an ethical dilemma. The trial court did not instruct the jury to

---

[73] This further distinguishes Cole's case from Bigby's. *See Bigby,* 402 F.3d at 572 ("Like the supplemental instructions in both *Penry II* and *Smith,* this instruction ties the jury's consideration of Bigby's mitigating evidence to the special issues. Specifically, it instructs the jury that if they find the mitigating evidence sufficient to warrant a life sentence rather than the death penalty, they must answer any special issues '*to which such mitigating circumstances apply*' in the negative. Thus, the instruction effectively shackled and confined the jury within the scope of the special issues.").

answer "yes" to the special issues if the prosecution proved them beyond a reasonable doubt and then instruct them to respond "no" (falsely) to one of the special issues if the mitigating evidence demonstrated that Cole did not deserve death.

Cole advances that the special issues must allow the jury to be able to respond favorably to the specific facts of each defendant's case. Stated differently, Cole contends that "generic" mitigating evidence is not sufficiently particularized to allow the jury to give it mitigating effect. Specifically, Cole maintains that the evidence that he presented at the punishment phase of his trial supported *only* the proposition that "everyone" mellows as they tend to get older. Thus, he urges, such evidence is insufficient to allow the jury to consider the mitigating evidence with respect to Cole as an individual. Cole maintains that *Smith* supports this proposition.

We do not read *Smith* so broadly. Although we recognize that we must consider the particularized facts of each defendant's case, nothing in *Smith* supports Cole's argument that trial counsel must submit "specific" – as opposed to "generic" – mitigating evidence at the punishment phase of trial. We do not have an ineffective assistance of counsel claim before us. Whether Cole's counsel should have presented more specific mitigating evidence is not a claim that we must reach today.

Further, we note that the mitigating evidence here is not as generic as counsel maintains. Both Dr. Wright and Dr. Dickerson explicitly referenced Cole when they testified at the punishment phase of the trial. Despite counsel's argument that the evidence supported only the proposition that all of us tend to "mellow" as we get older, Dr. Wright

and Dr. Dickerson compared Cole to the "generic" and broad mitigating evidence that they presented. Indeed, as Dr. Wright noted, to be any more specific with regard to Cole's particular future behavior would require a "crystal ball." The specific references to Cole in Dr. Wright's and Dr. Dickerson's testimony lead us to conclude that the jury could easily have understood that they included Cole individually within the mitigating evidence that they presented.

CONCLUSION

Because we conclude that jurists of reason could disagree with the district court's resolution of Cole's claims that the Texas special issues were not broad enough to allow the jury to give "full consideration and full effect" to his mitigating evidence, we reverse the district court's denial of a COA on Cole's *Penry* claim and grant him a COA. For the foregoing reasons, however, we ultimately conclude that the Texas special issues allowed the jury to give "full consideration and full effect" to the mitigating evidence that Cole presented at the punishment phase of his trial. We therefore affirm the district court's judgment denying habeas relief.

2006 WL 1523202 (Mem)
___S.Ct. ___, 75 USLW 3203

Supreme Court of the United States
Jalil ABDUL-KABIR fka **Ted** Calvin **Cole**,
petitioner,
v.
Nathaniel QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division.
No. 05-11284.

Oct. 13, 2006

Case below, *Cole v. Dretke*, 443 F.3d 441.

Motion of petitioner for leave to proceed *in forma pauperis* and petition for writ of certiorari to the United Staes Court of Appeals for the Fifth Circuit granted. The case is consolidated and a total of one hour is allotted for oral argument.

995 4

(4)

No. 05-11284

Supreme Court, U.S.
FILED
NOV 2 9 2006
OFFICE OF THE CLERK

In The Supreme Court of the United States

JALIL ABDUL-KABIR, formerly known as
TED CALVIN COLE,

Petitioner,

v.

NATHANIEL QUARTERMAN,
Director, Texas Department of Criminal Justice,
Correctional Institutions Division,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR PETITIONER

ROBERT C. OWEN
CAPITAL PUNISHMENT CENTER
UNIVERSITY OF TEXAS
SCHOOL OF LAW
727 East Dean Keeton
Austin, TX 78705
(512) 232-9391
Counsel of Record
for Petitioner

JORDAN M. STEIKER
CAPITAL PUNISHMENT CENTER
UNIVERSITY OF TEXAS
SCHOOL OF LAW
727 East Dean Keeton
Austin, TX 78705
(512) 232-1346

RAOUL D. SCHONEMANN
3774 Harrison Street
Oakland, CA 94611
(510) 654-1192

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

CAPITAL CASE

QUESTIONS PRESENTED

1. Did the pre-1991 Texas capital sentencing instructions – which permitted jurors to return only a "yes" or "no" answer to two "special issues" inquiring whether a defendant had killed "deliberately" and would probably constitute a "continuing threat to society" – deprive Mr. Cole of constitutionally adequate consideration of mitigating evidence about his mental impairment and childhood mistreatment and deprivation, in light of this Court's recognition in *Smith v. Texas*, 543 U.S. 37, 48 (2004), that those two questions "had little, if anything, to do with" Smith's evidence of mental impairment and childhood mistreatment?

2. Do this Court's opinions in *Penry v. Johnson*, 532 U.S. 782 (2001), and *Smith* preclude the Fifth Circuit from adhering to its earlier decisions refusing to find error under *Penry v. Lynaugh*, 492 U.S. 302 (1989), whenever the pre-1991 special issues might have afforded some stunted consideration of a defendant's mitigating evidence?

3. Does the Fifth Circuit's insistence that a defendant's mental disorder must be severe, permanent or untreatable in order to qualify for relief under *Penry*, impermissibly resurrect the threshold test for "constitutional relevance" that this Court rejected in *Tennard v. Dretke*, 542 U.S. 274 (2004)?

CAPITAL CASE

QUESTIONS PRESENTED – Continued

4. When the prosecution repeatedly implored jurors to "follow the law" and "do their duty" by answering the former Texas special issues factually and refusing to fashion answers designed to produce an appropriate sentence, is there "a reasonable probability that the jury has applied the . . . [special-issues] instructions in a way that prevents the consideration of constitutionally relevant evidence," *Boyde v. California*, 494 U.S. 370, 380 (1990)?

PARTIES TO THE PROCEEDINGS BELOW

The caption of the case contains the names of all parties to the proceedings in the courts below and in this Court, with the exception that during part of the prior proceedings, other individuals (Gary Johnson, Janie Cockrell, and Douglas Dretke) served as the named Director of the Texas Department of Criminal Justice, Correctional Institutions Division.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS BELOW	iii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	vii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE	1
STATEMENT OF THE CASE	2
A. Course of proceedings	2
B. Facts material to the issues presented	3
SUMMARY OF THE ARGUMENT	9
ARGUMENT	13
A. THE FORMER TEXAS SPECIAL ISSUES GAVE MR. COLE'S JURORS NO MEANINGFUL BASIS FOR GIVING EFFECT TO THE MITIGATING QUALITIES OF HIS CHILDHOOD MISTREATMENT, EMOTIONAL AND MENTAL DISORDERS, AND NEUROLOGICAL IMPAIRMENT	13
1. Mr. Cole's mitigating evidence was extensive and powerful	13
2. The "deliberateness" special issue afforded no vehicle for the jurors to consider and give effect to Mr. Cole's evidence	14

TABLE OF CONTENTS – Continued

Page

3. The "future dangerousness" special issue was not a vehicle for the jury to consider and give effect to the mitigating qualities of Mr. Cole's background of neglect, abandonment, and mistreatment; his resulting mental and emotional problems; or his organic neurological impairment 16

4. Prosecutors reinforced to the jurors that the special issues posed a narrow inquiry, and discouraged them from interpreting the special issues as authorizing a broad assessment of Mr. Cole's moral culpability or the appropriate sentence in light of all the evidence 19

B. THE FIFTH CIRCUIT MISAPPLIED THIS COURT'S *PENRY* JURISPRUDENCE IN HOLDING THAT THE JURORS, IN ASSESSING MR. COLE'S FUTURE DANGEROUSNESS, COULD GIVE MEANINGFUL MITIGATING EFFECT TO HIS EVIDENCE; IN FACT, JURORS COULD GIVE ONLY AGGRAVATING EFFECT TO THE EVIDENCE THAT MR. COLE WAS DEPRIVED, NEGLECTED, AND ABANDONED AS A CHILD, SUFFERED RESULTING MENTAL AND EMOTIONAL DISORDERS AS AN ADULT, AND THAT THOSE IMPAIRMENTS IN COMBINATION WITH AN ORGANIC NEUROLOGICAL DYSFUNCTION DIMINISHED HIS IMPULSE CONTROL AND JUDGMENT 25

TABLE OF CONTENTS – Continued

Page

C. THE STATE COURT DECISION REJECTING MR. COLE'S *PENRY* CLAIM WAS OBJECTIVELY UNREASONABLE 39

1. The CCA's decision was objectively unreasonable because it rested on theories of mitigation that were baseless under *Penry*, *Johnson*, and *Graham*, and that this Court declared untenable in *Tennard* 40

2. The CCA's reasoning aside, the result it reached was objectively unreasonable because the jury lacked a "meaningful basis to consider the relevant mitigating qualities" of Mr. Cole's mitigating evidence in answering the special issue questions 44

3. Recognizing the CCA's decision in Mr. Cole's case as an objectively unreasonable reading of *Penry* does no violence to this Court's decisions giving the States wide latitude to guide how a capital jury considers mitigating evidence 49

CONCLUSION 50

TABLE OF AUTHORITIES

Page

CASES

Abdul-Kabir v. Dretke, 543 U.S. 985 (2004) 2

Atkins v. Virginia, 536 U.S. 304 (2002) 18

Ayers v. Belmontes, ___ U.S. ___, 127 S. Ct. 469 (2006) 19

Bell v. Ohio, 438 U.S. 637 (1978) 14

Bigby v. State, 892 S.W.2d 864 (Tex. Crim. App. 1994) 15

Boyde v. California, 494 U.S. 370 (1990) 11, 19, 25, 27

Buchanan v. Angelone, 522 U.S. 269 (1998) 14

California v. Ramos, 463 U.S. 992 (1983) 14

Coble v. Dretke, 444 F.3d 345 (5th Cir. 2006) 27, 29

Ex parte Cole, No. 41,674-01 (Tex. Crim. App. Nov. 24, 1999) (unpublished) 2

Cole v. Dretke, 99 Fed. Appx. 523 (5th Cir. 2004) (unpublished) 2, 11, 32

Cole v. Dretke, 418 F.3d 494 (5th Cir. 2005) 1, 36

Cole v. Dretke, 443 F.3d 441 (5th Cir. 2006) 1, 2

Cole v. Johnson, No. 6:00-CV-014C (N.D. Tex. March 6, 2001) (unpublished) 1

Cole v. State, No. 70,401 (Tex. Crim. App. Sept. 26, 1990) (unpublished) 2

Cole v. Texas, 499 U.S. 982 (1991) 2

Eddings v. Oklahoma, 455 U.S. 104 (1982) 14

Florida v. Meyers, 466 U.S. 380 (1984) 28

Florida v. Nixon, 543 U.S. 175 (2005) 14

TABLE OF AUTHORITIES – Continued

Page

Franklin v. Lynaugh, 487 U.S. 164 (1988) 44, 45

Garcia v. Quarterman, 456 F.3d 463 (5th Cir. 2006) 27

Garcia v. State, 919 S.W.2d 370 (Tex. Crim. App. 1996) 41

Graham v. Collins, 506 U.S. 461 (1993) .....*passim*

Hernandez v. Johnson, 248 F.3d 344 (5th Cir. 2001) 29

Hitchcock v. Dugger, 481 U.S. 393 (1987)..... 14

Johnson v. Texas, 509 U.S. 350 (1993).....*passim*

Jurek v. Texas, 428 U.S. 262 (1976).....44, 45

Lockhart v. Fretwell, 506 U.S. 364 (1993) 42

Lucas v. Johnson, 132 F.3d 1069 (5th Cir. 1998) 29

McKoy v. North Carolina, 494 U.S. 433 (1990) 14

Mills v. Maryland, 486 U.S. 367 (1988)..... 14

Mines v. State, 888 S.W.2d 816 (Tex. Crim. App. 1994).....41, 42

Parker v. Dugger, 498 U.S. 301 (1991) 14

Penry v. Johnson, 532 U.S. 782 (2001)..... 9, 11, 17, 24, 25

Penry v. Lynaugh, 492 U.S. 302 (1989).....*passim*

Robertson v. Cockrell, 325 F.3d 243 (5th Cir. 2003) (*en banc*) 26

Robison v. Johnson, 151 F.3d 256 (5th Cir. 1998) 29

Rompilla v. Beard, 545 U.S. 374 (2005) 14

Roper v. Simmons, 543 U.S. 551 (2005) 18

Santosky v. Kramer, 455 U.S. 745 (1982).....18, 37

Skipper v. South Carolina, 476 U.S. 1 (1986) 18

TABLE OF AUTHORITIES – Continued

Page

Smith v. Texas, 543 U.S. 37 (2004) ..... *passim*

Strickland v. Washington, 466 U.S. 668 (1984) 42

Teague v. Lane, 489 U.S. 288 (1989) 35

Ex parte Tennard, 960 S.W.2d 57 (Tex. Crim. App. 1997) 43

Tennard v. Dretke, 542 U.S. 247 (2004) ..... *passim*

Thompson v. Oklahoma, 487 U.S. 815 (1988) 18

Williams v. Taylor, 529 U.S. 362 (2000) 14, 34, 37, 39

Woodford v. Viscotti, 537 U.S. 19 (2002) 14

Zimmerman v. State, 881 S.W.2d 360 (Tex. Crim. App. 1994) 41, 42, 43

CONSTITUTIONAL PROVISIONS

U.S. Const., amend. VIII 1

U.S. Const., amend. XIV 1

STATUTES

28 U.S.C. §1254(1) 1

28 U.S.C. §2254(d) 40, 42

Tex. Code Crim. Proc., art. 37.071 (Vernon 1989) 1

Tex. Code Crim. Proc., art. 37.071 (Vernon 2002) 15

Tex. Pen. Code §7.01 15

Tex. Pen. Code §7.02 15

Tex. Pen. Code §19.03 19

Tex. R. App. Proc. 34 3

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS

Brief of Petitioner, *Brewer v. Quarterman*, No. 05-11287 (O.T. 2005) 34, 37, 49

Transcript of Oral Argument, *Tennard v. Dretke*, No. 02-10038 (O.T. 2002) 28, 39

Joint Appendix, *Penry v. Lynaugh*, No. 87-6177 (O.T. 1987) 39

Joint Appendix, *Tennard v. Dretke*, No. 02-10038 (O.T. 2002) 28, 39

Chris Mallett, *Socio-Historical Analysis of Juvenile Offenders on Death Row*, 39 [No. 4] CRIM. LAW BULLETIN 3 (July 2003) 17

OPINIONS BELOW

The Fifth Circuit's opinion, *Cole v. Dretke*, 418 F.3d 494 (5th Cir. 2005), appears at Joint Appendix ("JA") 219-50. Its opinion denying rehearing *en banc*, *Cole v. Dretke*, 443 F.3d 441 (5th Cir. 2006), appears as Appendix B to Petitioner's Petition for Writ of Certiorari. The District Court's unpublished order, *Cole v. Johnson*, No. 6:00-CV-014C (N.D. Tex., March 6, 2001), appears at JA 180-218.

JURISDICTION

The Fifth Circuit entered judgment on July 22, 2005, and denied a timely petition for rehearing *en banc* on March 17, 2006. *Cole*, 443 F.3d at 441. Petitioner filed for certiorari on May 30. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The relevant portion of the Eighth Amendment, which the Fourteenth incorporates, provides: "nor [shall] cruel and unusual punishments [be] inflicted." The text of the former Texas capital sentencing statute, Texas Code of Criminal Procedure Ann. art. 37.071, is set out at pages 1-2 of the Brief for Petitioner in the consolidated case of *Brewer v. Quarterman*, No. 05-11287.

STATEMENT OF THE CASE

A. Course of proceedings

On June 3, 1988, a Texas jury convicted Petitioner ("Mr. Cole")[1] of intentionally killing Raymond C. Richardson in the course of a robbery; the same jury returned affirmative answers to the two special issue questions submitted pursuant to former Tex. Code Crim. Proc. art. 37.071, and the court imposed the death sentence mandated by that statute.

Mr. Cole's conviction was affirmed on direct appeal. *Cole v. State*, No. 70,401 (Tex. Crim. App. Sept. 26, 1990) (unpublished), *cert. denied*, *Cole v. Texas*, 499 U.S. 982 (1991). The Court of Criminal Appeals of Texas ("CCA") denied post-conviction relief. *Ex parte Cole*, No. 41,674-01 (Tex. Crim. App. Nov. 24, 1999) (unpublished). *See* JA 149-77, 178-79.

Mr. Cole unsuccessfully sought habeas relief in Federal District Court. *See* JA 180-218. Mr. Cole appealed; the Fifth Circuit affirmed, denying a Certificate of Appealability ("COA") on his claim under *Penry v. Lynaugh*, 492 U.S. 302 (1989). *Cole. v. Dretke*, 99 Fed. Appx. 523 (5th Cir. 2004) (unpublished). This Court ordered reconsideration in light of *Tennard v. Dretke*, 542 U.S. 274 (2004). *Abdul-Kabir v. Dretke*, 543 U.S. 985 (2004). The Fifth Circuit granted a COA but adhered to its prior decision and refused rehearing *en banc* over dissent. *See* JA 219-50; *see Cole*, 443 F.3d at 441.

---

[1] All relevant court documents and records in this case refer to Petitioner by his former name, Ted Calvin Cole. With Mr. Abdul-Kabir's permission, this brief will call him "Mr. Cole."

B. Facts material to the issues presented

The evidence at the guilt phase showed that Mr. Cole and two accomplices killed Raymond C. Richardson during a robbery. Mr. Cole's co-defendants were his step-brother Michael Hickey and Hickey's wife Christina, the victim's granddaughter. *See* XV RR 417-461.[2] Immediately before the crime, the three defendants were transients, "squatting" in an abandoned motel in San Angelo, Texas. XV RR 422. On December 13, 1987, the trio went to Richardson's house and visited with him for a couple of hours. *Id.* at 439. At some point, Cole took Richardson unawares, pushed him to the floor from behind, and strangled him with a dog leash while sitting on his back. *Id.* at 442-45. Michael Hickey took all the cash in Richardson's wallet – twenty dollars – and the three spent it on food. *Id.* at 295, 298, 449. The next morning, the Hickeys surrendered to police and implicated themselves and Mr. Cole. *Id.* at 454. By midafternoon, Mr. Cole had been arrested in Richardson's home and had confessed his own role in the crime. *Id.* at 292-99.

At punishment, the State presented evidence that Mr. Cole had gone to prison for the first time at age 16 after pleading guilty to murder. *See* XVII RR 697-710; *see also* State's Exhibits 36 (documents relating to Mr. Cole's 1974 murder conviction and resulting fifteen-year sentence).

---

[2] We cite the transcript of testimony from Mr. Cole's trial as "RR" ("Reporter's Record") and the pleadings, orders, etc., of the trial court as "CR" ("Clerk's Record"). *See* Tex. R. App. Proc. 34 and notes and commentary (defining "Clerk's Record" and "Reporter's Record").

The State also presented evidence that a few months after being released from serving his prison sentence for that murder, Mr. Cole was charged with two counts of aggravated sexual assault for having had sexual contact with two boys, aged eight and twelve. He confessed, pleaded guilty, and returned to prison in 1982. *See* XVII RR 740 and State's Exhibit 37. The State's final witness was psychiatrist Richard Coons, M.D., who testified that Mr. Cole's personality had "a number of sociopathic features" including a lack of remorse. JA 22-24. Dr. Coons testified that Mr. Cole's diary[3] showed him to be sexually attracted to young boys and reflected a "fantasy life" of compulsive attraction to criminal wrongdoing. JA 26. According to Dr. Coons, Mr. Cole's diary revealed inner thoughts obsessively preoccupied with "smuggling, stealing, robbing, raping, etcetera, [like a] modern-day viking[]." JA 26. Dr. Coons summed up that Mr. Cole could not profit from his experiences or learn from experience. JA 32.

The defense then presented extensive mitigating evidence establishing that Mr. Cole had been deprived, neglected, and abandoned as a child, as well as expert testimony about how that mistreatment had left him with enduring emotional and psychological scars. In addition, the defense presented expert testimony that Mr. Cole suffers likely neurological dysfunction that impairs his ability to control his impulses.

Nancy Doris Hickey, Mr. Cole's mother, described the trauma and despair that characterized her son's life. Mrs. Hickey was an alcoholic and her drinking made her unable

---

[3] The State had earlier introduced Mr. Cole's diary "on the issue of future dangerousness." XVII RR 683; *see* SX 34, 41.

to care for her children. JA 36. Shortly after Mr. Cole was born, his father was arrested for robbing a liquor store. JA 35. Before Mr. Cole was five years old, his father abandoned the family. JA 35-36. Mrs. Hickey described Mr. Cole's last meeting with his father:

> The last time he saw his father, his father brought him to San Angelo. He had took him off to Abilene and brought him to San Angelo and dropped him off a block from where he thought I lived and said, "Your mother lives down in that block. Go find her," and drove off. That's the last time he [saw] his father.

JA 42. Mr. Cole did not see his father again for ten years. *Id.*

Mrs. Hickey told the jury that after Mr. Cole's father abandoned the family, she worked at a "beer joint for three dollars a day and had two kids to feed." JA 36. Unable to manage her life and to care for her children, she took them to Oklahoma to live with her parents. *Id.* Mrs. Hickey's parents were also alcoholics and did not want her or the children to live with them. *Id.* Their house was eight miles outside town and Mr. Cole, then just five years old, was completely isolated from other children. The school buses did not run in that area and Mrs. Hickey's father refused to let her use his car to transport Mr. Cole to and from school. *Id.* Mr. Cole's mother therefore placed him in a church-run children's home. JA 37-38. Although Mr. Cole remained there for the next five years, his mother visited him only twice. *Id.*

Barbara Ann Dean, Mr. Cole's aunt, testified that when Mr. Cole visited her family as a child, on holidays during the five years he lived away from his family in the children's home, he seemed incapable of expressing his

feelings. JA 57. She added that Mr. Cole's father never visited him at all. JA 57.

Psychologist Jarvis Wright, Ph.D., who had spent more than ten hours interviewing and evaluating Mr. Cole on several different occasions, testified that Mr. Cole had endured a "very rugged, rough childhood." JA 67. In Dr. Wright's professional opinion, Mr. Cole showed evidence of having experienced "a bad, very painful background," and of continuing to endure great emotional pain as an adult. JA 68. Dr. Wright explained that Mr. Cole had "never felt loved and worthwhile in his life," and as a result experienced "terrific needs for nurturance" and suffered from a "fragmented personality" and "chronic depression." JA 67, 86. He also testified that Mr. Cole, while awaiting trial, was so "distressed" and "distraught" that he tried to kill himself by cutting his throat. JA 66.

In addition to the undisputed evidence of childhood neglect and abandonment, the jury also heard evidence that Mr. Cole suffered from diminished impulse control. JA 69. Dr. Wright attributed that impairment in part to Mr. Cole's "history" and "the pain in his life." JA 70. Dr. Wright also specifically identified as a separate cause of Mr. Cole's diminished impulse control a likely "neurological dysfunction in [his] central nervous system." JA 70. Dr. Wright diagnosed the latter condition based on a battery of psychological and neuropsychological tests administered by Dr. Wright prior to trial; on some such tests, Mr. Cole scored in the bottom five percent of the population. JA 63-66, 69, 75-78. As Dr. Wright explained,

> It indicates some central nervous damage or very likely central nervous damage. Combine that and all the other factors of Ted's background, all

> these other things, we're going to have an individual with some real problems with impulse control.

JA 69.

Dr. Wright testified that the combination of Mr. Cole's childhood history of neglect and abandonment and his neurological dysfunction had impaired Mr. Cole's judgment and his ability to control his behavior. JA 69-70. Dr. Wright testified that Mr. Cole's active fantasy life was at least in part a coping mechanism for dealing with the pain in his life, because Mr. Cole's early life experiences were so painful that he had erased memories of his childhood. JA 67, 70-72. Dr. Wright concluded by saying that although Mr. Cole started life with "fantastic raw material," (*i.e.*, high native intelligence),[4] the abandonment, neglect, and mistreatment he suffered as a child left his personality "very damaged" and "horribly" distorted. JA 73.

Dr. Wright speculated that Mr. Cole might eventually "burn out" and no longer constitute a threat to society. JA 69. In the meantime, however, because of Mr. Cole's lack of impulse control and the lasting emotional and psychological damage resulting from childhood mistreatment, Dr. Wright admitted that Mr. Cole was presently dangerous and would pose a threat until some point in time "years from now." JA 73-74; *see also id.* at 80 (admitting that Mr. Cole "absolutely" is more likely than the average person to "do something dangerous or antisocial or violent"); *id.* at 70 (Mr. Cole "very often can't behave in another way" than to give rein to his impulses).

---

[4] Dr. Wright testified that Mr. Cole had a full-scale IQ of 121. JA 63.

The defense also called Dr. Wendell Dickerson, former chief mental health officer of the Texas prison system, to address "the issue of predicting behavior generally." JA 92. Dr. Dickerson asserted that predictions of future violence, grounded on whatever basis, tend to be wrong about one-third of the time. JA 94. He called violent conduct "overwhelmingly the province of the young," usually occurring before age twenty-five and being "really rare indeed" by age fifty. JA 95. Although he admitted that he had not examined Mr. Cole, he had reviewed the tests given by Dr. Wright. JA 96. Dr. Dickerson declined to offer an opinion about Mr. Cole's "tendencies of changing," JA 101, but expressed hope that Mr. Cole might not be dangerous "five, ten, fifteen years from now," because "whatever condition he is suffering from is not necessarily immutable and unchangeable." JA 102. Nevertheless, like Dr. Wright, he refused to say that Mr. Cole was "not dangerous." JA 101. Asked bluntly by the prosecutor whether Mr. Cole was a continuing threat to society, Dr. Dickerson tried to evade the question but ended up confirming that he would be "alarmed" and "concerned about the future danger" posed by Mr. Cole. JA 113.

At closing, the prosecutor initially argued that the evidence compelled "yes" answers to both questions: "yes" to deliberateness because the crime had been planned in advance (as shown by Mr. Cole's diary) and "yes" to dangerousness based on Mr. Cole's prior history and other diary entries. JA 133-40. He said nothing about the circumstances of Mr. Cole's background or his mental impairment.

Defense counsel, during his turn, was unable to articulate any straightforward way for the jury to find that Mr. Cole's troubled background, mental and emotional problems, or neurologically based impulse control problems supported a "no" answer to the future dangerousness

question. Having been denied additional jury instructions, *see* JA 115-24 and XVII RR 855-59, defense counsel simply pleaded with the jurors to find some way to respond to the intuitive relevance of Mr. Cole's traumatic life history in deciding the appropriate punishment. *See* JA 142-45; *see also* Section A.4 *infra* (discussing closing argument in greater detail). Nowhere in his brief summation did defense counsel explain how Mr. Cole's background or mental impairment could sensibly support a "no" answer to the "future dangerousness" question. *See* JA 141-45.

The prosecutor responded in his final summation that the jury was called on solely to "answer those [special issue] questions correctly." JA 148. He firmly reminded the jurors that they had "promised" during voir dire to answer the special issues "yes" if the State "met its burden of proof." JA 145. He emphasized their "duty" to admit that the State had done just that. JA 147.

The jury unanimously found that Mr. Cole murdered Mr. Richardson "deliberately" and posed a "continuing threat to society," mandating a death sentence. *See* JA 127-28.

SUMMARY OF THE ARGUMENT

More than ten years ago, this Court reaffirmed in *Johnson v. Texas*, 509 U.S. 350, 369 (1993), that capital sentencing instructions must give jurors a "meaningful basis to consider the relevant mitigating qualities" of whatever mitigating factors the defendant offers. *Accord Penry v. Johnson*, 532 U.S. 782, 797 (2001) ("*Penry II*"), *Smith v. Texas*, 543 U.S. 37, 46 (2004). The Texas system under which Mr. Cole was condemned gave his jurors no such opportunity in light of the sentencing instructions as

they functioned in the broader context of his trial. Just as in *Penry*, jurors were limited to the deliberateness and dangerousness special issues, which failed to address the relevant mitigating qualities of Mr. Cole's childhood neglect and mistreatment, his resulting mental and emotional impairments as an adult, and his diminished impulse control due to organic neurological dysfunction. Worse, and again as in *Penry*, the only commonsense inference to be drawn from his evidence in mitigation was that Mr. Cole would likely be dangerous in the future – as his own expert witnesses candidly acknowledged. And the prosecution exploited the facial narrowness of the inquiries of the special issues by insisting that jurors should focus solely on whether Mr. Cole was presently dangerous or would pose a dangerous threat in the future, rather than considering what potentially mitigating factors might account for or explain his dangerousness.

When the Fifth Circuit originally refused a COA on Mr. Cole's *Penry* claim, it did not have the benefit of *Tennard*. On remand from this Court, the Fifth Circuit ignored the lessons of *Tennard* in denying relief. First, it distinguished *Penry* on the basis of its own longstanding set of categorical rules according to which certain types of mitigating evidence are, by definition, non-problematic under the former special issue scheme. Because the mitigating evidence suggested that Mr. Cole's impairment was not necessarily permanent and did not indicate that he was incapable of "learning from his mistakes," the Fifth Circuit found Mr. Cole's evidence within the jury's effective reach in assessing his "future dangerousness." *See* JA 242. With respect to the evidence that Mr. Cole was neglected and abandoned as a child, the Fifth Circuit held that this

Court's decision in *Graham v. Collins*, 506 U.S. 461 (1993), "indicated that 'family background' evidence falls within the broad scope of Texas' special issues." JA 243.

Beyond applying these categorical rules, the Fifth Circuit relied on the fact that Mr. Cole's experts testified that violent offenders tend to "burn out" at some point after age forty. JA 240-42. Despite the fact that this aspect of their testimony was unconnected to the specific features of Mr. Cole's background, the Fifth Circuit held that the testimony of Mr. Cole's experts transformed the "future dangerousness" issue into a vehicle by which jurors could consider circumstances in Mr. Cole's background that made him a violent offender. JA 244. The Fifth Circuit did not explain how that characterization of the testimony could be reconciled with its earlier finding that Mr. Cole's own experts expressed such an unqualified view of his likely dangerousness that their testimony rendered harmless the improper admission of comparable testimony from a prosecution expert. *See Cole*, 99 Fed. Appx. at 531-32.

Neither of these rationales can withstand scrutiny. *Tennard* and *Penry* itself preclude the Fifth Circuit's reliance on categorical rules that treat all "non-permanent" mental disorders as outside *Penry*'s scope. This Court has made clear that to determine whether the jury could reasonably have given effect to mitigating evidence, a reviewing court must pay close and careful attention to the evidence, the instructions, and the context of the trial proceedings as a whole. *Boyde v. California*, 494 U.S. 370, 383 (1990); *Penry II*, 532 U.S. at 800-02. The Fifth Circuit's fallback position – that the testimony of Mr. Cole's experts provided a path to lead the jurors from Mr. Cole's background evidence to a "no" answer to the special issues – is unsupportable on the record. The primary

thrust of those witnesses' testimony was to account for Mr. Cole's violent behavior in terms of his tormented background and neurological dysfunction. To the extent that they expressed hope that he, like all violent offenders, might "burn out" eventually, such testimony is too thin a reed upon which to base a finding that the jurors could give Mr. Cole's mitigating evidence meaningful consideration in answering the "future dangerousness" question.

The decision of the CCA earlier in the case was equally at odds with this Court's precedents and demonstrably constituted an objectively unreasonable application of the Court's clearly established Federal law. Instead of heeding *Penry*'s command to examine Mr. Cole's particular mitigating evidence and determine whether, as a practical matter, the jury's instructions put that evidence beyond the jurors' "effective reach," the CCA first cited its *own* cases applying sweeping categorical rules purporting to define the limits of *Penry* and holding specifically that mitigating evidence could pose no *Penry* problem unless it was as severe as Penry's own and possessed an explicit causal "nexus" to the crime. Almost as an afterthought, the CCA also asserted that the testimony of Mr. Cole's experts gave the jury a sufficient vehicle for considering his mitigating evidence. Above and beyond its flawed methodology, the CCA's decision was objectively unreasonable under *Penry* because no principled distinction can be drawn between the circumstances of Mr. Cole's case and those which compelled this Court to grant relief in *Penry* itself.

Neither the Fifth Circuit nor the CCA ever confronted the constitutionally controlling question under *Penry* and *Johnson*: whether jurors could give meaningful consideration and effect to the mitigating qualities of Mr. Cole's

childhood neglect and abandonment, his resulting mental and emotional problems as an adult, and his diminished impulse control owing to both his background experiences and an organic neurological dysfunction. Neither court offered any factual explanation of how these specific mitigating circumstances could have been understood to make Mr. Cole *less dangerous*, so that they would have been within the jurors' reach in answering the "future dangerousness" issue. Realistically, as is apparent from the testimony of his own experts, Mr. Cole's mitigating evidence could have served only to support an inference that he *would* probably continue to be dangerous in the future. Because the former Texas special issues gave Mr. Cole's jurors no "meaningful basis" for considering the mitigating qualities of those factors but treated them as exclusively and decisively aggravating, Mr. Cole's death sentence cannot stand.

ARGUMENT

A. THE FORMER TEXAS SPECIAL ISSUES GAVE MR. COLE'S JURORS NO MEANINGFUL BASIS FOR GIVING EFFECT TO THE MITIGATING QUALITIES OF HIS CHILDHOOD MISTREATMENT, EMOTIONAL AND MENTAL DISORDERS, AND NEUROLOGICAL IMPAIRMENT.

1. Mr. Cole's mitigating evidence was extensive and powerful.

Mr. Cole's mitigating evidence included childhood deprivation, mental and emotional problems, and organic neurological impairment. This Court has expressly recognized that such circumstances can justifiably motivate jurors to impose a life sentence. Suffering deprivation or

mistreatment as a child is mitigating. *Hitchcock v. Dugger*, 481 U.S. 393, 398 (1987) (the "difficult circumstances" of the defendant's upbringing were mitigating, including the fact that he "had been one of seven children in a poor family that earned its living by picking cotton"); *Eddings v. Oklahoma*, 455 U.S. 104, 116 (1982) (defendant "raised in a neglectful, sometimes even violent, family background").[5] This Court has also consistently reaffirmed that emotional problems or mental impairments are mitigating. *Eddings*, 455 U.S at 115 ("emotional disturbance"); *Bell v. Ohio*, 438 U.S. 637, 641-42 (1978) (defendant was "mentally deficient" due to "his drug problem and emotional instability"); *Penry*, 492 U.S. at 319 ("emotional and mental problems").[6] In addition, evidence that the defendant suffers from neurological damage or impairment has been recognized as mitigating. *See, e.g., Mills v. Maryland*, 486 U.S. 367, 370 n.1 (1988) ("minimal brain damage").[7]

2. The "deliberateness" special issue afforded no vehicle for the jurors to consider and give effect to Mr. Cole's evidence.

The deliberateness inquiry afforded no vehicle for consideration of Mr. Cole's mitigating evidence because it did not require an assessment of his moral culpability. *Penry* recognized this basic shortcoming. *Penry*, 492 U.S.

---

[5] *See also, e.g., Parker v. Dugger*, 498 U.S. 308, 314 (1991).

[6] *See also, e.g., Tennard*, 542 U.S. at 288; *Williams v. Taylor*, 529 U.S. 362, 398 (2000); *Buchanan v. Angelone*, 522 U.S. 269, 278 (1998); *McKoy v. North Carolina*, 494 U.S. 433, 437 (1990).

[7] *See also, e.g., California v. Ramos*, 463 U.S. 992, 995 n.2 (1983); *Florida v. Nixon*, 543 U.S. 175, 192 (2005); *Rompilla v. Beard*, 545 U.S. 374, 392-93 (2005); *Woodford v. Viscotti*, 537 U.S. 19 (2002) (*per curiam*).

at 322 ("Personal culpability is not solely a function of a defendant's capacity to act 'deliberately' "). Tellingly, since *Penry* this Court has never upheld a Texas death sentence on the theory that the "deliberateness" issue afforded adequate consideration of the defendant's evidence. Nor could it do so here.

There is no suggestion in *Penry* that the unadorned deliberateness question can enable meaningful consideration of the defendant's mitigating circumstances, because that inquiry fails to focus jurors on a broad assessment of the defendant's personal moral culpability. *See Penry*, 492 U.S. at 323.[8] Mr. Cole's jurors received no definition of "deliberately," *see* JA 125-29, and the State assured them that in the absence of any such instruction they were free to apply their own idiosyncratic understanding of the term. *See, e.g.*, VII RR 908 (prosecutor to juror Campos: since "deliberately" will not be defined, "you use your own common sense reason of what 'deliberately' may be").[9]

---

[8] The "deliberateness" question was originally designed to ensure that the *mens rea* of defendants convicted under a theory of vicarious liability satisfied the Eighth Amendment. Such a finding was necessary because, although a capital murder conviction in Texas typically requires an "intentional" killing, persons convicted under Texas' "law of parties" need not themselves have intended to kill. *See* Tex. Pen. Code §§7.01, 7.02. The post-*Penry* statute clarified this by substituting a new *mens rea* question applicable only to persons convicted under the "law of parties." *See* Tex. Crim. Proc. Code Ann. art. 37.071(2)(b)(2) (Vernon 2002). Given that the "deliberateness" inquiry was never intended as a vehicle for assessing moral culpability, it comes as no surprise that Texas courts came to treat it simply as confirming the presence of a culpable mental state vaguely "more than intent but . . . less than premeditation." *Bigby v. State*, 892 S.W.2d 864, 890 (Tex. Crim. App. 1994).

[9] *See also, e.g.*, IX RR 1301 (same, to juror Vogt); XI RR 1481 (same, to juror Golden); XIII RR 1915 (same, to juror Rocap); VIII RR 963 (prosecutor to juror Lewis: Lewis may use his "own personal

(Continued on following page)

Jurors may well have concluded that Mr. Cole committed the crime "deliberately" according to commonsense understandings of that term, yet they may also have concluded that Mr. Cole's deprived background, ensuing psychological and emotional problems, and neurological impairment reduced his moral culpability so as to make a death sentence unwarranted. *See Penry*, 492 U.S. at 322-23. Under those circumstances, their instructions required them to answer the "deliberateness" question in the affirmative, calling for a death sentence. In short, particularly against the background of the prosecutor's comments, the limited *mens rea* inquiry framed by the first special issue did not afford the jurors a meaningful vehicle for assessing Mr. Cole's moral culpability.

3. The "future dangerousness" special issue was not a vehicle for the jury to consider and give effect to the mitigating qualities of Mr. Cole's background of neglect, abandonment, and mistreatment; his resulting mental and emotional problems; or his organic neurological impairment.

Mr. Cole's evidence of childhood deprivation and mental impairment possessed the same relationship to the second special issue as Penry's evidence of an abused childhood and mental retardation. *See Tennard*, 542 U.S. at 288 (suggesting evident *Penry* error where "[t]he relationship between the special issues and Tennard's low IQ evidence ha[d] the same essential features as the relationship between the special issues and Penry's mental retardation evidence"). That is to

---

definition" of deliberately); *id.* at 1085 (same, to juror Duncan); XI RR 1564 (same, to juror Beeson).

say, the circumstances of Mr. Cole's background offered as factors in mitigation tended to *explain*, rather than *rebut*, the strong inference of his present and probable future dangerousness. Had the defense offered those circumstances to disprove future dangerousness, one would expect Mr. Cole's primary expert witness, Dr. Wright, who described Mr. Cole's traumatic background and mental impairments in detail, to have offered jurors some basis for inferring that those features of Mr. Cole's background improved his prospects for rehabilitation or made it likely that he would develop into a non-dangerous person. Dr. Wright offered no such theory. Similarly, one would expect defense counsel to have provided jurors at closing argument some chain of reasoning to get them from the facts of Mr. Cole's traumatic background and mental impairment to a "no" answer to the second special issue. He did not. *See* JA 141-45. Both understood that the relevant mitigating qualities of Mr. Cole's background, like those of the evidence at issue in *Smith* and *Penry II*, had "little, if anything, to do with" the inquiry framed by the future dangerousness issue. *See Smith*, 543 U.S. at 48.

No court in this case has offered any theory of how a history of neglect, abandonment, and mistreatment as a child renders a defendant like Mr. Cole less dangerous, and common sense teaches exactly the opposite. Experts recognize that children subjected to maltreatment are likely to be impaired in their impulse control and thus are prone to acting out violently.[10] Lay experience confirms

---

[10] *See, e.g.*, Chris Mallett, *Socio-Historical Analysis of Juvenile Offenders on Death Row*, 39 No. 4 CRIM. LAW BULLETIN 3 (July 2003) at 2 (researchers have documented that "physical and psychological maltreatment" of children "is associated with aggressive behaviors").

this connection.[11] In this case, of course, jurors did not need to *infer* that Mr. Cole's ability to control his impulses was impaired, because they heard direct testimony to that effect from Dr. Wright. JA 69.

Impaired mental or psychological functioning likewise undermines a person's judgment and capacity to appreciate the appropriateness or likely consequences of his actions. *Penry* recognized that those features of mental impairment would tend to persuade jurors that the impaired defendant – a defendant like Mr. Cole – would likely be dangerous in the future. *See, e.g., Tennard*, 542 U.S. at 289. Yet the same aspects of mental impairment reduce the defendant's moral culpability and call the fitness of a death sentence into question. *Skipper v. South Carolina*, 476 U.S. 1, 13-14 (1986) (Powell, J., concurring in judgment) (a defendant's "reduced capacity for considered choice" and his "emotional history" both "bear directly on the fundamental justice of imposing capital punishment"); *see, e.g., Roper v. Simmons*, 543 U.S. 551, 569-570 (2005); *Atkins v. Virginia*, 536 U.S. 304, 318 (2002); *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) (plurality opinion). A forced choice in answering the unadorned future dangerousness question "yes" or "no" gave jurors no way to express the conclusion that notwithstanding Mr. Cole's probable dangerousness, a death sentence would be excessive for him in light of his mental impairments and

---

[11] *See, e.g., Santosky v. Kramer*, 455 U.S. 745, 788-89 (1982) (Rehnquist, J., joined by Burger, C.J., and White and O'Connor, JJ., dissenting) ("It requires no citation of authority to assert that children who are abused in their youth generally face extraordinary problems developing into responsible, productive citizens. The same can be said of children who, though not physically or emotionally abused, are passed from one foster home to another with no constancy of love, trust, or discipline.").

traumatic childhood, and the bearing of those factors on his moral culpability for the crime. In this respect, too, this case is squarely controlled by *Penry*.

4. Prosecutors reinforced to the jurors that the special issues posed a narrow inquiry, and discouraged them from interpreting the special issues as authorizing a broad assessment of Mr. Cole's moral culpability or the appropriate sentence in light of all the evidence.

This Court has explained that in assessing whether a jury charge precluded the jury from considering or giving effect from a defendant's mitigating evidence, the reviewing court must consider the context of the entire trial. *See, e.g., Boyde*, 494 U.S. at 380-83; *see also, e.g., Ayers v. Belmontes*, ___ U.S. ___, 127 S. Ct. 469 (2006) (modeling this analysis). One key part of that context is what the jurors were told, during voir dire and closing argument, about how to reach their decision. Here, the prosecutors told the jurors without qualification to answer the special issues literally and cautioned them not to undertake any broader inquiry into the defendant's culpability or consider the appropriateness of the sentence required by their factual "yes" or "no" answers to the "deliberateness" and "future dangerousness" questions.

Jurors received no indication that the "deliberateness" issue concerned anything other than the defendant's *mens rea* prior to the crime. Jurors were told that there was a distinction between killing "intentionally" (the *mens rea* applicable to the underlying capital offense under Tex. Pen. Code §19.03) and killing "deliberately," but that they were free to apply their own commonsense definition of the latter term in making that judgment. *See supra*. Such

guidance did not prepare jurors to view their answer to the "deliberateness" inquiry as expressing their judgment about Mr. Cole's personal moral culpability in light of his history of mistreatment as a child, his resulting psychological and emotional problems, and his neurological impairment. The prosecutors' closing argument regarding the first special issue reflected the same narrow perspective, emphasizing the degree of planning prior to the crime as sufficient to support an affirmative answer. *See, e.g.*, JA 132-33.

During voir dire, the prosecution also instructed the jurors that the "future dangerousness" question did not invite them to express their conclusion about the appropriate sentence in light of all the evidence. Rather, the prosecutors advised jurors that they were to exercise no discretion in answering either question; they were duty-bound to answer the questions strictly according to the evidence.

For example, the prosecutor elicited from juror Beeson her promise not to "substitute [her] opinion" about the appropriate punishment for Mr. Cole "for what the legislature has provided," *i.e.*, the answers to the special issues, because the legislature has chosen to limit "the scope of [her] consideration" to those inquiries alone. XI RR 1566-67; *see also* XI RR 1577 (juror Beeson instructed by prosecutor that she may not "find against the evidence" in answering the special issues "just because of the way you felt about the parties or about the crime." The prosecutor made clear to juror Beeson that she must put her views about the appropriate punishment "out of [her] mind":

> If a person had a bad upbringing, but looking at those special issues, you felt that they [sic] met the standards regarding deliberateness and being a continuing threat to society, could you still vote "yes," even though you felt like maybe they'd [sic]

> had a rough time as a kid? If you felt that the facts brought to you by the prosecution warranted a "yes" answer, could you *put that out of your mind and just go by the facts*?

XI RR 1588 (emphasis added). Similarly, the prosecutor explained to juror Rocap that the jury "in Texas does not say life or death," but must "answer[] those questions . . . to the best of their ability under their oath to judge the question and give the answer based on the evidence, regardless of what their personal preference might be as [to] what they'd like to see happen in the case." XIII RR 1900. He elicited juror Rocap's promise "not [to] skew the answer [to the special issue questions] to produce the desired result contrary to the evidence." XIII RR 1917. The prosecutor advised juror Clemmer, "[a]ll that you will be required to do is answer those questions"; he solicited her agreement that, "regardless of the circumstances, you know, the particular aspects of the case," she would answer "yes" as long as "the State meets its burden." VII RR 758. He similarly obtained agreements from juror Campos, VII RR 911, and juror Duncan, VIII RR 1084, that both would answer the special issues "yes" if the State met its burden of proof.

The punishment phase closing arguments of both parties likewise reinforced the inadequacy of the pre-1991 special issues as applied to Mr. Cole's mitigating evidence. Defense counsel began by saying that the "two issues" the jury faced were "whether he lives and . . . whether he dies," but acknowledged that "to get to that," the jury would "have to answer . . . two special issues." JA 141. He devoted a few sentences to the testimony of the defense experts, alluding to the testimony that "burnout" was a possibility at "forty, fifty, sixty years old" but admitting that "there's no guarantee of that." JA 142. The court

having denied his requested instructions on mitigating evidence, counsel was at a loss to articulate any straightforward way for the jury to reason from Mr. Cole's troubled background and impulse control problems to a "no" answer to either of the special issues. At best, defense counsel's argument amounted to a desperate plea that the jury nullify the special issues in order to give effect to the intuitive mitigating relevance of Mr. Cole's traumatic life history and neurological deficits. JA 142-43. Defense counsel briefly mentioned that the jurors could, in deciding the deliberateness question, consider the fact that nothing in Mr. Cole's diary indicated that the murder was "premeditated" or "thought out." JA 144. But then he abandoned any reference to the special issues, completing his plea as follows:

> There's only one question in this trial this afternoon – [and that] is whether he lives or dies.
>
> . . . Kelly Hickey . . . is just as guilty as Ted is. But she's going to the penitentiary for thirty years. The State is asking you to kill Ted. Can you in all good conscience do that?
>
> Look at all the evidence again. . . . Think about it, read it, mull it over . . . and decide Ted's fate. But believe it or not, he is a human being. . . . Can we in all good conscience sentence him to death?

JA 144-45. Nowhere in his brief summation did defense counsel urge that the evidence about how Mr. Cole was mistreated as a child, or the longstanding impairments he suffered as a consequence, or his central nervous system damage, logically could support a "no" answer to the "future dangerousness" question.

With his very first words in response, the prosecutor insisted that the jury focus solely on answering the special issues on their own terms:

> You promised the State on voir dire that you'd give a fair hearing both to the defendant and to the State. You also promised the State that, if it met its burden of proof, you would answer those questions "yes," to special issue number 1 and 2. And the State submits that it has met that burden.

JA 145. The prosecutor summed up his plea:

> Future dangerousness? Yes. Society has a right to protect itself. And the time is now for you to do your duty; and that duty is to admit the State has met its burden of proof in this case and to answer special issue number one "yes," and special issue number two "yes." That's what the evidence points to beyond a reasonable doubt, what you heard on this stand, what you will see – what you see in the paperwork. The time has come to act, and the time is to answer – please, this is a serious thing, and I'm not going to make light of it. It's a time for you to consider it all and make that decision and answer those questions correctly. But the State suggests – strongly urges and points to the evidence – the answer is "yes" to both those special issues.

JA 147-78. This argument is precisely the type of entreaty to which this Court pointed in *Penry* as reflecting the inadequacy of the pre-1991 special issues to permit meaningful consideration of mitigating evidence. *See Penry*, 492 U.S. at 325.

It is unsurprising that defense counsel never argued that Mr. Cole's childhood deprivation, resulting mental

and emotional problems, or neurological impairment could support an honest "no" answer to the "future dangerousness" question. To the extent that any of those conditions bore on his dangerousness at all, they made it more likely, rather than less, that he would act out violently in the future. Hence, defense counsel simply begged the jurors to do "[t]he right thing" by "answer[ing] those special issues in such a manner that he be sent to prison for life." JA 143. It is unlikely that the jurors would have thought they were free to express their reasoned judgment about Mr. Cole's reduced moral culpability by answering the "future dangerousness" question "no" where defense counsel never suggested any way they could do so without violating their oath to answer the questions honestly according to the evidence. This is especially so where both defense experts had conceded that Mr. Cole was presently dangerous and likely to remain that way for years, and the prosecutor emphasized the jurors' obligation to answer the special issues on their own terms. In the same vein, Penry's defense counsel initially urged the jury to answer the first special issue "no" because "it would be the just answer, and [a] proper answer." *Penry*, 492 U.S. at 325.[12]

---

[12] Denied his requested instructions, defense counsel here, like his counterpart in *Penry*, was foreclosed from arguing that jurors could reason meaningfully from the nature of the mitigating evidence to a negative finding on the "future dangerousness" question. As a result, he simply pleaded for nullification. This Court has held that "nullification" is not an appropriate mechanism for accommodating the Eighth Amendment requirement of individualized sentencing, even when the jury charge explicitly authorizes that response. *Penry II*, 532 U.S. at 790; *Smith*, 543 U.S. at 45-48. If anything, the unadorned pre-1991 special issues afforded Mr. Cole – whose counsel could only plead with jurors to "do the right thing" by answering the special issues "in such a manner that he be sent to prison for life" – even less protection than the defendants in those cases.

B. THE FIFTH CIRCUIT MISAPPLIED THIS COURT'S *PENRY* JURISPRUDENCE IN HOLDING THAT THE JURORS, IN ASSESSING MR. COLE'S FUTURE DANGEROUSNESS, COULD GIVE MEANINGFUL MITIGATING EFFECT TO HIS EVIDENCE; IN FACT, JURORS COULD GIVE ONLY AGGRAVATING EFFECT TO THE EVIDENCE THAT MR. COLE WAS DEPRIVED, NEGLECTED, AND ABANDONED AS A CHILD, SUFFERED RESULTING MENTAL AND EMOTIONAL DISORDERS AS AN ADULT, AND THAT THOSE IMPAIRMENTS IN COMBINATION WITH AN ORGANIC NEUROLOGICAL DYSFUNCTION DIMINISHED HIS IMPULSE CONTROL AND JUDGMENT.

Despite this Court's remand for reconsideration in light of *Tennard*, the Fifth Circuit failed to consider whether the jury's instructions enabled it "to consider and give effect to . . . [Mr. Cole's particular] mitigating evidence," *Tennard*, 542 U.S. at 285 (quoting *Boyde*, 494 U.S. at 377-78). Under *Penry* and *Boyde*, that inquiry required attention to the specific mitigating evidence presented by Mr. Cole and whether it came within the reach of the special issues as they were likely to be understood "in light of all that ha[d] taken place in the trial," *Boyde*, 494 U.S. at 381; *accord Penry II*, 532 U.S. at 800-02. But instead the Fifth Circuit analyzed Mr. Cole's *Penry* claim within an abstract conceptual framework of its own making that treated large categories of mitigating evidence – such as any mental disorder that is arguably treatable or otherwise not necessarily permanent – as *ipso facto* within the jury's effective reach under the future dangerousness question. This mechanistic reasoning effectively resurrected the very "screening tests" this Court condemned in *Tennard*.

First, and notably, the Fifth Circuit altogether failed to examine the rejection of Mr. Cole's *Penry* claim by the Court of Criminal Appeals. Although the Fifth Circuit mentions in passing that Mr. Cole pressed his *Penry* claim in state post-conviction proceedings, *see* JA 221, it offers no analysis at all of how the CCA treated that *Penry* claim. Had the Fifth Circuit undertaken such an analysis, it would have found that the CCA rejected the claim pursuant to its own precedents requiring that a claimant under *Penry* demonstrate a "nexus" between his mitigating evidence and his crime, and further show that he suffered from mental impairment as "severe" as Penry's. *See* Section C.1 *infra*. These preconditions for applying *Penry* were, of course, condemned outright in *Tennard* as lacking any basis in this Court's jurisprudence. *See Tennard*, 542 U.S. at 284.

Second, the Fifth Circuit's analysis of the merits of Mr. Cole's *Penry* claim followed its longstanding practice of designating large, broadly-defined classes of evidence as categorically non-problematic under *Penry*. *See, e.g.*, *Robertson v. Cockrell*, 325 F.3d 243, 249-251 (5th Cir. 2003) (*en banc*) (noting that Texas capital defendants have attempted to invoke *Penry* regarding "many different types of mitigating evidence," including "subnormal intelligence," "troubled or abused childhood," "head injury," and "mental illness," and citing numerous cases denying relief in each category).[13] Repeatedly, the Fifth

[13] This approach rightly disquieted Judge Higginbotham. *See Robertson*, 325 F.3d at 258-59 (Higginbotham, J., concurring) (cautioning against "categorical characterization of . . . disabilities as transient or permanent," and calling it "judicial hubris" to "pronounce as a matter of law that even . . . severe child abuse creates only a transient condition").

Circuit has seized upon these sweeping classifications as the bases for threshold judgments that obviate the need to explain how the particular evidence in a given case could reasonably have been understood to support a finding of non-dangerousness. *See Tennard*, 542 U.S. at 283-84.[14] This is exactly the kind of foreshortened analysis this Court condemned in *Tennard*, because it derails the analysis called for by *Penry* and *Boyde*: an examination of whether there was a reasonable likelihood, in light of everything that happened at trial, that meaningful consideration was precluded.

This type of categorical reasoning drove the Fifth Circuit's rejection of Mr. Cole's *Penry* claim. The Fifth Circuit began its analysis by emphasizing that the evidence at Penry's trial showed that Penry's mental impairment "prevented him from learning from his mistakes." JA 239. The Fifth Circuit found that the evidence about Mr. Cole's childhood trauma, adult mental and emotional disorders and neurological impairment, in contrast, "did not suggest that [Mr. Cole] was unable to learn from his mistakes." JA 242. From this observation, the Fifth Circuit drew the insupportably broader conclusion that Mr. Cole's jurors would not have viewed his mitigating evidence as aggravating under the "future dangerousness" question because it did not show he "cannot learn from his mistakes." JA 242.[15]

---

[14] *Tennard* did not end the practice. *See, e.g., Garcia v. Quarterman*, 456 F.3d 463, 479 (Benavides, J., dissenting) (5th Cir. 2006).

[15] This same mistaken formulation taints other Fifth Circuit *Penry* cases. *See, e.g., Coble v. Dretke*, 444 F.3d 345, 362 (5th Cir. 2006) (distinguishing Coble's troubled childhood from Penry's because it did not cause any "mental impairment that prevented [Coble] from learning

(Continued on following page)

Nothing in *Tennard* supports the Fifth Circuit's view that the future dangerousness question is inadequate to permit consideration of mitigating circumstances *only* where the defendant suffers from a *cognitive* impairment that *altogether* prevents him from learning from his mistakes. This analysis, in fact, has much in common with Respondent's argument in *Tennard*. *See, e.g.*, Transcript of Oral Argument, *Tennard v. Dretke*, No. 02-10038 (O.T. 2002), at 40-41 (Respondent's counsel: *Penry* error requires "evidence that's *solely aggravating* in answering those special issues, not necessarily evidence that . . . has some relevance outside those special issues, [but evidence that] *only has aggravating relevance* within them") (emphasis supplied). The same argument features prominently in the *Tennard* dissent. *See Tennard*, 542 U.S. at 293 (Rehnquist, C.J., dissenting) (*Penry* implicates only conditions which are "necessarily" aggravating with respect to future dangerousness). For that reason, it was particularly inappropriate on remand in light of *Tennard* for the Fifth Circuit to take this view.[16]

Tennard directs the reviewing court to consider whether the defendant's mitigating evidence *bears the same relationship as Penry's to the "deliberateness" and "dangerousness" issues*, not whether every aspect of the defendant's evidence is precisely the same as Penry's (*e.g.*, an inability to "learn from his mistakes"). There are many ways in which a defendant's impairments may make him dangerous, and inability to recognize one's mistakes is just

---

from his mistakes," and "[i]t is this inability to learn from one's mistakes that suggests . . . future dangerousness").

[16] *See, e.g., Florida v. Meyers*, 466 U.S. 380, 382 (1984) (summarily reversing state court decision that had accepted an argument this Court had "expressly rejected" in resolving the same question).

one of them. A defendant with emotional or psychiatric disorders may be well aware that he is making the same "mistake" again but be unable to stop himself. Limiting the availability of relief under *Penry* to offenders with the first type of impairment (*e.g.*, cognitive disorders) rather than the second (*e.g.*, psychotic disorders), would render the "future dangerousness" question anything but a *reliable* means for jurors to give such evidence mitigating effect. *Graham*, 506 U.S. at 475; *accord Penry II*, *Smith*.

The Fifth Circuit employed similarly categorical reasoning in emphasizing that Mr. Cole's mental impairment was not necessarily a permanent condition. JA 242, 242 n.54. It has repeatedly offered the same rationale – identifying a defendant's mental disorder as "non-permanent," and then asserting that *any* non-permanent condition can by definition be given mitigating effect under the "future dangerousness" question – in numerous other cases. *See*, *e.g.*, *Coble*, 444 F.3d at 359-360 (because defendant's bipolar disorder and post-traumatic stress disorder were treatable, jurors could give them mitigating effect in assessing his future dangerousness, despite the fact that the defendant's own experts conceded that his disorders "would make him a continuing threat").[17] This inflexible rule that any "non-permanent" mental disorder is *per se* unproblematic under *Penry* effectively resurrects

[17] *See also, e.g.*, *Hernandez v. Johnson*, 248 F.3d 344, 349 (5th Cir. 2001) (no *Penry* problem where defendant's mental illness was treatable); *Lucas v. Johnson*, 132 F.3d 1069, 1082-83 (5th Cir. 1998) (no *Penry* problem where defendant's schizophrenia "responded well to antipsychotic drugs"); *Robison v. Johnson*, 151 F.3d 256, 265 (5th Cir. 1998) (same, where defendant's schizophrenia was "in remission").

the "uniquely severe permanent handicap" threshold screening test this Court rejected in *Tennard*. *See* 542 U.S. at 289.[18]

Nor can this Court sustain the Fifth Circuit's holding that the testimony of Mr. Cole's experts brought the relevant mitigating qualities of his childhood mistreatment, mental and emotional disorders, neurological dysfunction, or diminished impulse control within the jurors' grasp in answering the future dangerousness question. *See* JA 239-43. The Fifth Circuit reasoned as follows in reaching that conclusion: First, it emphasized that Mr. Cole's own experts had testified that – "not now, but later in life" – "individuals who have had this kind of background ... change. They burn out." JA 240. Second, it found that a juror who credited this part of the experts' testimony would have been able to honestly answer "no" to the future dangerousness question. JA 243-44 ("Specifically, the jury could have considered Cole's ... organic deficiency evidence under – at the least – the future dangerousness special issue. Given the experts' testimony during the punishment phase, the jury could have believed them and found that, although Cole ... may suffer from diminished impulse control, he is capable of change and thus would not necessarily remain a danger in the future").

Contrary to the Fifth Circuit's characterization, Mr. Cole's experts for the most part offered only the unremarkable observation that violent individuals generally

---

[18] Moreover, contrary to the Fifth Circuit's comment that the evidence at Mr. Cole's trial "suggest[ed] that even someone with ... an organic neurological deficiency changes later in life," JA 242, *none* of the expert testimony indicated that Mr. Cole's neurological dysfunction *itself* was "non-permanent." Such a condition, like the disabilities addressed in *Penry*, *Tennard*, and *Smith*, is in fact permanent.

become less likely to be violent as they age, and that one might hope Mr. Cole would follow the same arc. *See*, *e.g.*, JA 79, 74 (Dr. Wright's testimony that "research indicates that . . . individuals who commit violent [acts]" change as they grow older, in part because "the process of aging takes over, *as it does in all of us*") (emphasis added). Even if the jury credited that testimony, the mitigating inference that arises from it is true for *any* offender; it is a *generic* argument that speaks to the likelihood that most offenders become less dangerous as they grow older. This inference is no less true, in other words, of defendants who come from loving and supportive backgrounds and who lack any psychological or neurological impairment than it is of a defendant like Mr. Cole, shaped by a background of neglect and mistreatment and burdened by impaired impulse control and mental disorders. While the "future dangerousness" question may have been an adequate vehicle for the jury to give mitigating effect to generic evidence indicating that *all* defendants generally grow less violent as they age, it gave the jury *no* vehicle for expressing the conclusion that the unique constellation of mitigating circumstances present in Mr. Cole's background reduced his moral culpability for the crime so as to call for a life sentence.

Perhaps most troubling, it is only by ignoring the tenor of most of the testimony of Drs. Wright and Dickerson that the Fifth Circuit can suggest that their testimony held out hope for the jury that Mr. Cole might someday no longer pose a "continuing threat to society." Both Dr. Wright and Dr. Dickerson admitted that Mr. Cole was presently dangerous and was likely to be dangerous for a long time to come. Indeed, the Fifth Circuit *itself*, earlier in this case, acknowledged that point. When Mr. Cole was first before the Court of Appeals – when his

Penry claim was a dead letter owing to the Fifth Circuit screening tests this Court had yet to overturn in *Tennard* – he argued that he had been harmed by the improper admission of the testimony of prosecution psychiatrist Dr. Coons, who had examined Mr. Cole after indictment without notice to defense counsel. *See Cole*, 99 Fed. Appx. at 531-32. Explaining its view that any Sixth Amendment violation was harmless, the Fifth Circuit stated, "[t]he only direct future-dangerousness opinions offered at [the] penalty phase came from Cole's own experts, and *even they would not deny that he posed a risk of future dangerousness.*" *Id.* at 532 (emphasis added). It is impossible to square that characterization of the record – that Mr. Cole's own experts expressed the opinion that he was a future danger so strongly that the improper admission of Dr. Coons' testimony to the same effect was harmless – with the Fifth Circuit's subsequently expressed view that "the evidence proffered by Cole's expert witnesses suggested to the jury that Cole could change in the future." JA 242. A full review of the testimony bears out the Fifth Circuit's original characterization – that the thrust of Dr. Wright's evaluation of Mr. Cole did not aim at rebutting his dangerousness but at *accounting for it* by reference to his childhood mistreatment, mental and emotional problems, and diminished impulse control due to neurological dysfunction.

In the final analysis, some of the expe ts' testimony indicated Mr. Cole might grow less dangerous with the passage of the years *for reasons unrelated to his mitigating circumstances* – for reasons that would apply, in Dr. Wright's words, to "all of us." The Fifth Circuit's view that this testimony presented the jury with an adequate vehicle for giving meaningful effect to the relevant mitigating qualities of the circumstances of Mr. Cole's background *as*

such is erroneous, as is its broader view that allowing jurors to consider and give effect to the "non-permanent" nature of a mental disorder is an acceptable substitute for allowing them to consider and give effect to the actual consequences of that disorder for an offender's moral culpability. While the transience or amenability to treatment of a particular mental disorder that increases a defendant's dangerousness might make that disorder *less aggravating* under the future dangerousness question, this Court's cases demand that the jury be provided a vehicle for considering such evidence *as mitigating* – not simply as potentially somewhat less aggravating.

The "signature qualities" of mental impairment – unlike those of youth, *see Johnson*, 509 U.S. at 368 – are not invariably transient. It would have been speculative at best for the jurors to assume that Mr. Cole's mental impairments, even if treated, would not in the future substantially impair his judgment or behavior in a way that would make him act out dangerously again. Certainly, jurors were not required to draw the inference that Mr. Cole would necessarily receive any such treatment or care in the prison system. In short, there was abundant evidence from which the jury "might well have" concluded, *see Tennard*, that Mr. Cole's mental impairment made him a future danger to society, regardless of any potential "treatability" of his psychological impairment.

Moreover, speculation about whether Mr. Cole's condition might eventually abate misses the point. The relevant mitigating quality of Mr. Cole's mental illness is not that it may be dormant at times in the future, or that it might be effectively treated in the future with some combination of medication and/or therapy. The relevant mitigating quality of Mr. Cole's mental disorder is that a reasonable juror could

have found that it made him *less culpable* for murdering Raymond Richardson. Yet, having concluded that Mr. Cole's psychiatric impairment undermined his culpability, the jurors would have had no reliable way to give effect to that judgment. As in *Penry*, the fact that Mr. Cole had mental and emotional disorders that combined with his organic neurological dysfunction to diminish his impulse control and judgment was relevant to dangerousness, if at all, only as aggravating, and Mr. Cole's chances of receiving a "no" answer would have been improved rather than diminished had that evidence never been placed before the jury.[19]

Nor do this Court's cases support the Fifth Circuit's ultimate conclusion that evidence of childhood mistreatment can be given meaningful mitigating effect in answering the future dangerousness question. First, of course, *Penry* itself recognized that the special issues were inadequate for Penry's own evidence of an abused childhood.[20] The Fifth Circuit's attempted limitation of *Penry* – by suggesting that in *Graham* this Court "indicated that 'family background' evidence falls within the broad scope

---

[19] *See* Brief for Petitioner in *Brewer v. Quarterman*, No. 05-11287, at 28-29 n.16.

[20] The view that childhood mistreatment can be given meaningful mitigating effect in assessing a defendant's dangerousness is also difficult to reconcile with *Williams*. Addressing whether Williams suffered prejudice from his counsel's failure to develop evidence of his abused background, this Court conceded that such evidence probably would not have precluded a finding of future dangerousness. 529 U.S. at 398. But the Court nonetheless found prejudice because evidence about Williams' deprived childhood could well have influenced the jury's appraisal of his moral culpability. *Williams* necessarily suggests that the most relevant mitigating qualities of childhood trauma and mistreatment have little to do with the defendant's likely future dangerousness.

of the special issues," JA 243 – distorts the holdings of both cases.

Because Graham sought relief in federal habeas, he was entitled only to the benefit of such law as existed when his conviction became final in 1984. *Teague v. Lane*, 489 U.S. 288 (1989). *Graham* thus focused on whether, in 1984, this Court's individualization decisions would have *dictated* the conclusion that Graham's youth and background evidence could not be given mitigating effect within the former special issues. *See Graham*, 506 U.S. at 477. Examining Graham's evidence and how it was presented and argued at trial, this Court found no individualization error. At the same time, its analysis in no way categorically ruled out all "family background evidence" as non-problematic under *Penry*. *See Smith*, 543 U.S at 48 (finding the former special issues an inadequate vehicle for considering mitigating evidence about Smith's troubled family background).

Graham's youth, being inevitably transient, bore straightforward mitigating relevance to the future dangerousness issue. *Graham*, 506 U.S. at 475-76. With respect to Graham's background, the Court emphasized that Graham "offered testimony concerning his upbringing and positive character traits" that painted him as a "real nice, respectable" person who "would pitch in on family chores" and buy food and clothes for his own children. *Graham*, 506 U.S. at 463-64. Graham's grandmother, with whom he had stayed from time to time as a child during his mother's periodic hospitalizations for a "nervous condition," attested that Graham was "never . . . violent or disrespectful," "attended church regularly," and "loved the Lord." *Id.* at 464. This portrayal permitted defense counsel to argue in closing that "Graham's criminal behavior [w]as aberrational," and counsel "vigorously urged the jury to

answer 'no' to the special issues based on this evidence." *Id.* at 464, 475.

Unlike Mr. Cole's case, *Graham* did not involve evidence of a *troubled* family background, marked by mistreatment, abandonment, and neglect, and this Court nowhere described the circumstances of Graham's background in those terms. Instead, Graham's evidence was offered to highlight his positive character traits and excellent prospects for rehabilitation. Thus framed, such evidence, like Graham's youth itself, had a natural tendency to support a "no" answer to the future dangerousness question. None of these aspects of *Graham* remotely resemble Mr. Cole's case, in which defense counsel presented evidence of Mr. Cole's traumatic childhood, mental and emotional problems, reduced impulse control, and organic neurological dysfunction to help jurors understand why he came to commit murder, rather than to emphasize his positive character traits and capacity for rehabilitation. These clear distinctions make the Fifth Circuit's strained attempt to invoke *Graham* to dismiss the evidence of Mr. Cole's traumatic childhood, and thereby to circumscribe *Penry*, wholly untenable.[21]

Neither party at Mr. Cole's trial made any argument that Mr. Cole's abused childhood logically warranted a "no" answer to the "future dangerousness" question, and there is no reason to assume that jurors would have drawn such

---

[21] The Fifth Circuit also cited *Johnson* as support for its denial of Mr. Cole's *Penry* claim, saying that *Johnson* "clarified" *Penry* by "confirm[ing] its limited scope." *Cole*, 418 F.3d at 505. This view of *Johnson* is not just erroneous but objectively unreasonable; *Johnson* expressly reaffirmed *Penry*'s holding as applied to evidence indistinguishable from Mr. Cole's. *See* Section C.2 *infra*.

a counter-intuitive inference on their own. *See* Section A.4 *supra*. Any speculation that the jury understood Mr. Cole's history of childhood mistreatment as reducing the likelihood of his "future dangerousness" would be inconsistent with both commonsense perceptions and judicial assessments of the relationship between abusive backgrounds and future dangerousness.[22]

Equally untenable is the Fifth Circuit's reliance on what it calls a "supplemental instruction" given to Mr. Cole's jury and which it says enhanced the jurors' ability to respond to his mitigating evidence in answering the special issues. That instruction read:

> You are further instructed that in determining each of these Special Issues you may take into consideration all of the evidence submitted to you in the full trial of this case, that is, all of the evidence submitted to you in the first part of this case wherein you were called upon to determine the guilt or innocence of the defendant, and all of the evidence, if any, admitted before you in the second part of the trial wherein you are called upon to determine the answers to the Special Issues hereby submitted to you.

JA 126. The Fifth Circuit described this "supplemental instruction" as being "almost word for word" the same as

---

[22] Childhood abuse is commonly understood to have long-term effects, *see, e.g., Williams*, 529 U.S. at 398; *Santosky*, 455 U.S. at 788-89 (dissenting opinion), and courts confronted with claims of ineffective assistance of counsel based on a defense attorney's failure to develop or present evidence of childhood abuse have often rejected those claims precisely because of the recognition that jurors may infer future dangerousness from such evidence. *See* Brief for Petitioner in *Brewer v. Quarterman*, No. 05-11287, at 27-28 n.15.

one given in *Johnson* and said that, unlike the "nullification instructions" struck down in *Penry II* and *Smith*, it contained no conflicting messages but unambiguously "instructed the jury to *consider* the mitigating evidence when deciding the special issues." JA 246 n.66.

This analysis is doubly flawed. First, the instructions given in *Cole* and in *Johnson* differ crucially in language and context. In *Johnson*, jurors were expressly directed to consider all evidence "*whether aggravating or mitigating in nature*." *Johnson*, 509 U.S. at 355 (emphasis added).[23] Johnson's mitigating evidence had unique relevance to the "future dangerousness" question and was presented and argued in a way that was aimed at persuading jurors of his excellent prospects for timely rehabilitation. *See* Section C *infra*. In *that* context, the presence of an additional instruction *that specifically referenced "mitigating" evidence* understandably reinforced this Court's conclusion that Johnson's jurors were not precluded from considering his evidence. In Mr. Cole's case, by contrast, the punishment-phase instructions made no mention whatsoever of "mitigating" evidence; and that omission, in the context of the testimony, *voir dire* examinations, and closing arguments at Mr. Cole's trial, *see* Section A *supra*, compels precisely the opposite conclusion.

---

[23] The instruction given to Johnson's jurors read: "In determining each of these Issues, you may take into consideration all the evidence submitted to you in the trial of this case, *whether aggravating or mitigating in nature*, that is, all the evidence in the first part of the trial when you were called upon to determine the guilt or innocence of the Defendant and all the evidence, if any, in the second part of the trial wherein you are called upon to determine the answers to the Special Issues." *Johnson*, 509 U.S. at 355 (emphasis added).

Second, the instruction in question is not a "supplemental" instruction at all, but a standard instruction in Texas capital cases. The same instruction was given at Tennard's trial, *see* Joint Appendix, *Tennard v. Dretke*, No. 02-10038 (O.T. 2002) at 67, and at *Penry*'s original trial, *see* Joint Appendix, *Penry v. Lynaugh*, No. 87-6177 (O.T. 1987) at 26. This Court has never attached any significance to the instruction – which manifestly says and means only that the jury, in answering the special issues, should consider evidence admitted at both phases of the trial. The Fifth Circuit went seriously awry in treating it as broadening the scope of the special issues themselves, issues explicitly requiring yes-or-no "findings of deliberateness and future dangerousness that had little, if anything, to do with the mitigation evidence . . . [Mr. Cole] presented," *Smith*, 543 U.S. at 48.

C. THE STATE COURT DECISION REJECTING MR. COLE'S *PENRY* CLAIM WAS OBJECTIVELY UNREASONABLE.

As we have noted above, the Fifth Circuit never examined the CCA's rationale for rejecting Mr. Cole's *Penry* claim on state post-conviction review; it simply conducted its own analysis – an incorrect one – in denying sentencing relief under *Penry*. Properly examined, the CCA decision is deeply flawed, "objectively unreasonable,"[24] in two respects. It relies centrally on the same "severity" and "nexus" limitations of *Penry* that this Court found indefensible in *Tennard*. *See* Section C.1 *infra*. And it reaches

[24] *Williams*, 529 U.S. at 409 (Justice O'Connor, speaking for the Court on this point).

a conclusion that constitutes an unreasonable application of *Penry* to the record of Mr. Cole's trial. *See* Section C.2 *infra*.

Evaluating both of these aspects of the CCA's decision begins with an identification of the rule of "clearly established Federal law, as determined by [this] Court" that the CCA was obliged to apply. 28 U.S.C. §2254(d). Namely, capital sentencing instructions must give jurors a "meaningful basis to consider the relevant mitigating qualities" of the defendant's evidence. *Johnson*, 509 U.S. at 369; *see also Graham*, 506 U.S. at 475 (the former special issues are unconstitutional as applied if they provide the jury "no reliable means of giving mitigating effect to that evidence").

1. The CCA's decision was objectively unreasonable because it rested on theories of mitigation that were baseless under *Penry*, *Johnson*, and *Graham*, and that this Court declared untenable in *Tennard*.

The state court decision rejecting Mr. Cole's *Penry* claim rested on two grounds.[25] First, the state courts employed the very type of threshold, categorical reasoning rejected in *Tennard*; despite acknowledging the wealth of

---

[25] The only state-court analysis of Mr. Cole's *Penry* claim comes from the convicting court, which entered "findings and conclusions" regarding all Mr. Cole's claims for relief. *See* JA 149-77. The CCA adopted the trial court's findings as to Mr. Cole's *Penry* claim *in toto*. *See* JA 179 ("[A]llegation sixteen," respecting which the CCA declined to adopt "the conclusion concerning all post-*Penry* cases," JA 179, is *not* the constitutional claim at issue here. The *Penry* claim that forms the basis for the present federal habeas action was allegation number one in Mr. Cole's state habeas application. *See* JA 154).

mitigating evidence presented at Mr. Cole's trial,[26] they dismissed the possibility of *Penry* error with the observation that evidence of "bad family background, bipolar disorder, low I.Q., substance abuse, head injury, paranoid personality disorder and child abuse [is] sufficiently considered under the special issues."[27] Second, the court maintained that the testimony of Mr. Cole's expert witnesses provided some basis for jurors to give effect to Mr. Cole's mitigating evidence. Both conclusions are objectively unreasonable.

The state courts' bald assertion that certain types of mitigating evidence – including evidence of "bad family background," "child abuse," and certain serious mental and emotional problems – pose no problems under *Penry* is rooted in the discredited test of constitutional relevance this Court rejected in *Tennard*.[28] The state cases cited for the proposition depend on the "nexus" and "severity" tests of constitutional relevance, and this Court has already deemed recourse to those tests objectively unreasonable.[29]

---

[26] *See* JA 157-59.

[27] *See* JA 160.

[28] In tandem with the Texas cases relying on the discredited "nexus" and "severity" tests, the state courts also cited this Court's decision in *Graham*. *See* JA 159. As we have shown, *see* Section B *supra*, *Graham* provides no support for the argument that the former special issues invariably permitted adequate consideration of all types of background evidence, particularly evidence of a deprived or traumatic childhood.

[29] The state cases cited were *Garcia v. State*, 919 S.W.2d 370 (Tex. Crim. App. 1996); *Mines v. State*, 888 S.W.2d 816 (Tex. Crim. App. 1994); and *Zimmerman v. State*, 881 S.W.2d 360 (Tex. Crim. App. 1994). *Garcia* did not require the CCA to interpret *Penry*, as Garcia's jury received a supplemental charge tracking the broad language of the current (post-*Penry*) Texas statute, which would have afforded consideration to any mitigating evidence presented. *Mines* and *Zimmerman*, however, rest squarely on the "severity" and "nexus" criteria condemned in *Tennard*. The CCA rejected Mines' *Penry* claim because his bipolar

(Continued on following page)

Where clear misstatements of the law form part of the basis for a state court decision, the state court decision as a whole is objectively unreasonable under 28 U.S.C. §2254(d). *See Williams v. Taylor*, 529 U.S. 362, 414 (2000) (treating a state-court decision as an unreasonable application of clearly established Federal law in part because the state court had erroneously identified *Lockhart v. Fretwell*, 506 U.S. 364 (1993), rather than *Strickland v. Washington*, 466 U.S. 668 (1984), as stating the test for "prejudice" in an ineffective-assistance-of-counsel case, and "[i]t is impossible to determine ... the extent to which the [state court's] error ... affected its ultimate finding [of] no prejudice"). Similarly, it is impossible here to identify what aspects of Mr. Cole's mitigating evidence the CCA viewed as irrelevant to the jury's sentencing decision "beyond the scope of the special issues" because that evidence failed the "severity" or "nexus" tests. Because the cases cited by the state court indicate it drew that conclusion with respect to at least some of Mr. Cole's mitigating evidence, however, *Williams* counsels this Court to treat the state courts' disposition of Mr. Cole's *Penry* claim as objectively unreasonable.[30]

---

disorder was not a "long term mental illness that [would] preclude[] him from confirming his behavior to societal expectations." *Mines*, 888 S.W.2d at 817. It added that Mines had established no causal nexus between his illness and his crime. *Id.* at 818 n.2. Zimmerman presented mitigating evidence of a below-average IQ and "paranoid personality disorder," as well as testimony that he had grown up in a "very disruptive, uneven family environment" marked by abandonment and abuse. *Zimmerman*, 881 S.W.2d at 362. The CCA rejected Zimmerman's claimed mitigating circumstances as "not ris[ing] to the level of [those] in *Penry*," because he failed to show evidence of a "tangible mental defect"). *Id.* Zimmerman, too, failed to show any causal "nexus between his 'mitigating' evidence and his commission of the offense." *Id.* at 363.

[30] To be sure, the CCA's analysis is confusing and inconsistent from one case to another. Sometimes the CCA's "nexus" and "severity" tests

(Continued on following page)

The state courts were also unreasonable in rejecting Mr. Cole's *Penry* claim on the ground that the testimony of Drs. Wright and Dickerson provided some basis for the jury to have given consideration to Mr. Cole's mitigating evidence. *See* JA 160-61. As discussed in detail *supra*, the fact that these psychologists expressed some hope that Mr. Cole might "burn out" and become non-dangerous at some point as far distant as twenty years in the future[31] did not convert the "future dangerousness" question into a reliable vehicle for jurors to give effect to the relevant mitigating qualities of Mr. Cole's history of childhood mistreatment, his resulting mental and emotional disorders, and his organic neurological dysfunction. Neither the CCA nor anyone at trial suggested how the jurors could rationally

---

appear as rigid threshold screens of constitutional relevance that make further *Penry* analysis unnecessary. *See, e.g., Zimmerman*. At other times, the CCA seems to cite its "nexus" and "severity" requirements as a sort of shorthand for its understanding of what kind of evidence would raise *Penry* problems under the special issues. But in the latter case, even when the CCA articulates what looks like the right question (*i.e.*, can this evidence be given effect within the special issues?), it conducts no analysis beyond asking whether the evidence is substantially identical to Penry's. In *Tennard*, for example, the CCA ultimately asserted that "[t]here was ample room within special issue two for the jury to give effect to any mitigating qualities of [Tennard's] low IQ evidence." *Ex parte Tennard*, 960 S.W.2d 57, 63 (Tex. Crim. App. 1997). But as this Court later recognized, that outcome turned on what the CCA perceived as the categorical distinction between mental retardation and other kinds of impairment, not the relationship between Tennard's mitigating evidence and the special issues in the context of his trial. *Compare Tennard*, 960 S.W.2d at 60-61 (addressing in detail, under the subheading "Mental Retardation," why Tennard's 67 IQ did not mean that he was mentally retarded and hence within *Penry*'s scope), with *Tennard*, 542 U.S. at 288.

[31] Mr. Cole was about thirty years old at the time of trial. Dr. Dickerson speculated that "burnout" generally occurred by age fifty. *See* JA 95. Thus, it appears that all parties agreed that Mr. Cole's present dangerousness could continue for as much as two decades.

reason from that evidence to a "no" answer to the "future dangerousness" question; everyone at trial – including Mr. Cole's own expert witnesses – accepted that that evidence proved Mr. Cole's dangerousness for years to come. On this record, the CCA's decision denying *Penry* relief was objectively unreasonable.

2. The CCA's reasoning aside, the result it reached was objectively unreasonable because the jury lacked a "meaningful basis to consider the relevant mitigating qualities" of Mr. Cole's mitigating evidence in answering the special issue questions.

Even putting aside the objectively unreasonable analysis underlying the CCA's rejection of Mr. Cole's *Penry* claim, this Court cannot endorse the conclusion that the jury could give meaningful mitigating effect to Mr. Cole's history of childhood abuse and mental impairment in answering the future dangerousness issue. Simply put, it was objectively unreasonable for the CCA to find *Penry* relief foreclosed for Mr. Cole when he was, in principle, indistinguishably situated from Penry himself.

When the CCA rejected Mr. Cole's *Penry* claim in 1999, the "clearly established Federal law" from this Court relevant to his claim consisted primarily of *Jurek v. Texas*, 428 U.S. 262 (1976), *Franklin v. Lynaugh*, 487 U.S. 164 (1988) (plurality opinion), *Penry*, *Graham*, and *Johnson*. *Penry* pointed unambiguously to the result Mr. Cole urged, and nothing in *Jurek*, *Franklin*, *Graham* or *Johnson* should have changed that result, given that Mr. Cole had presented mitigating evidence that was indistinguishable in its relevant mitigating aspects from the mitigating evidence presented in *Penry* itself.

Penry held that mitigating evidence of mental retardation and childhood abuse could not be given meaningful mitigating consideration by a jury limited to the "deliberateness" and "future dangerousness" issues because such evidence lacked straightforward mitigating relevance to those issues. 492 U.S. at 328. Unlike the mitigating evidence presented in *Jurek* (relative youth, good work history, and aid to his family) or *Franklin* (the defendant's clean prison disciplinary record), the circumstances of Penry's background could well have been given *aggravating* effect under the future dangerousness issue. *Penry*, 492 U.S at 323-24. And although those factors bore some mitigating relevance to the "deliberateness" question, 492 U.S. at 322, their primary mitigating relevance in reducing Penry's moral culpability was not reliably captured by their logical relevance to whether he was capable of "deliberate" conduct as that term is commonly understood. Accordingly, this Court held that some instruction beyond the "deliberateness" and "dangerousness" issues was constitutionally required.

The second case that could have informed the CCA's evaluation of Mr. Cole's *Penry* claim was *Graham*. But for the reasons explained in Section B *supra*, *Graham* cannot save the CCA's rejection of Mr. Cole's *Penry* claim. Graham offered his background evidence to highlight his positive character traits and excellent prospects for rehabilitation. The thrust of Mr. Cole's case in mitigation, by contrast, was that a childhood marked by neglect and abandonment had left him suffering serious psychological and emotional torment as an adult, and that neurological dysfunction, in combination with that traumatic background, robbed him of the impulse control and judgment of a normal, unimpaired person. In short, the mitigating evidence here,

unlike in *Graham*, tried to offer an *explanation* for Mr. Cole's violent behavior.

Graham nowhere purported to modify or undermine *Penry*'s holding that jurors could give no meaningful effect to evidence of mental impairment or childhood mistreatment under the former special issues. Accordingly, if the CCA in 1999 thought *Graham* required it to deny *Penry* relief to Mr. Cole, that conclusion was objectively unreasonable.

The final potentially relevant precedent, *Johnson*, concerned exclusively whether Johnson's mitigating evidence of youth *simpliciter* had received meaningful consideration under the former Texas special issues. *Johnson*, 509 U.S. at 367 ("The question presented here is whether the Texas special issues allowed adequate consideration of petitioner's youth"). Thus, the Court was obliged to decide whether the reasoning of *Penry* extended to evidence of a defendant's youthful age without more. (Johnson was nineteen at the time of his crime). Embracing parts of the analysis in *Graham*, the Court concluded that "the relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient," and accordingly that the inevitably transitory nature of youth meant that the future dangerousness question could afford it meaningful consideration. 509 U.S. at 368.

Johnson had presented very little other background evidence. *See Johnson*, 509 U.S. at 356-57.[32] Given that the Court had granted review to decide solely whether youth

[32] That evidence indicated that Johnson had been a regular churchgoer as a child, that his mother died and his sister was murdered during his adolescence, that he was negatively influenced by bad friends and illegal drugs, and that he was remorseful for his crimes. *Id.*

could be given effect as mitigating under the former Texas special issues, it is not surprising that the Court did not address separately whether Johnson's other mitigating evidence required an additional instruction beyond the "deliberateness" and "future dangerousness" issues.[33]

More important, *Johnson* expressly reaffirmed the core holding of *Penry*. *Johnson*, 509 U.S. at 369 ("*Penry* remains the law and must be given a fair reading"). It cast no doubt on the insufficiency of the special issues in the context of mitigating evidence sharing the same essential features as Penry's evidence of mental impairment and child abuse. For that reason, if the CCA interpreted *Johnson* as a license to deny *Penry* relief in Mr. Cole's case, it was objectively unreasonable in doing so.

This court's decisions since *Graham* and *Johnson* are consistent in treating those opinions as not disturbing the core holding of *Penry*. Both *Penry II* and *Smith* rest on the principle that the jury's sentencing instructions must not exclude from meaningful consideration the "relevant

[33] Moreover, like Graham and unlike Mr. Cole, Johnson aimed his mitigating evidence directly at the "future dangerousness" question. *See Johnson*, 509 U.S. at 369 (Johnson's lawyer urged the jury to regard any negative consequences of Johnson's background as imminently "subject to change," and thus "readily comprehended as a mitigating factor in consideration of the second special issue"). Further, and again unlike Mr. Cole, Johnson did not object to the standard special issue questions as inadequate to permit consideration of his evidence, nor offer alternative instructions to broaden the scope of the jury's inquiry. *Id.* at 355, 358. Because Johnson explicitly directed his entire mitigating presentation to portraying himself as a teenager likely soon to mature into a non-dangerous adult – a prediction bolstered by evidence of prior good character and remorse for the crime – this Court concluded that the future dangerousness issue gave the jury a meaningful vehicle for responding to his youth.

mitigating qualities" of the defendant's evidence. Regardless of the precise terms in which the test is framed, its central requirement is that the jury must have a "reliable means for giving mitigating effect to [the defendant's] evidence." *Graham*, 506 U.S. at 475. In the context of this case, Mr. Cole's jury had no such "reliable means" for expressing the conclusion that a sentence less than death was the appropriate punishment for a defendant with a history of childhood neglect and abandonment, emotional and psychological impairment, and diminished impulse control due to neurological dysfunction. Neither the CCA nor the Fifth Circuit articulated any explanation of how those mitigating factors could be linked to "non-dangerousness" in a way that would make the "future dangerousness" question a sensible, direct way to give effect to their relevant mitigating qualities – because no such way exists.

The result in *Penry* turned on how Penry's mitigating evidence related to the special issues, rather than on any unique abstract quality of Penry's mitigating evidence itself. *See, e.g., Tennard*, 542 U.S. at 288 (finding that the relationship between Tennard's low IQ and the former special issues had the "same essential features" as those found to require relief in *Penry*). *Penry* clearly held that the relevant mitigating qualities of childhood deprivation – of abuse, mistreatment, abandonment, neglect, and the like – could not be meaningfully addressed via the special issues. Nothing in *Graham* or *Johnson* retreated from the core of *Penry*'s clear holding with respect to evidence of the destructive impact of such experiences in the defendant's background. Given that Mr. Cole's history of childhood mistreatment and his mental and emotional disorders as an adult, not to mention his organic neurological dysfunction, shared the same relevant mitigating qualities as

Penry's abused childhood and mental retardation, it was objectively unreasonable for the CCA to reach a different outcome in Mr. Cole's case than this Court reached in *Penry*.

3. Recognizing the CCA's decision in Mr. Cole's case as an objectively unreasonable reading of *Penry* does no violence to this Court's decisions giving the States wide latitude to guide how a capital jury considers mitigating evidence.

This point is demonstrated in Section C.3 of the Brief for Petitioner in the consolidated case of *Brewer v. Quarterman*, No. 05-11287, and we will not trespass on the Court's time by repeating that subpart here.

CONCLUSION

The Fifth Circuit's decision on remand in light of *Tennard* cannot be squared with *Tennard*. The Fifth Circuit relies on reasoning explicitly rejected in *Tennard* and, moreover, completely ignores that the CCA's decision rejecting Mr. Cole's *Penry* claim rested in substantial part on the same "nexus" and "severity" requirements that *Tennard* declared baseless. Mr. Cole's mitigating evidence bore no relationship to either of the two pre-1991 Texas special issues that were submitted to the jury as the sole determinants of his sentence. Furthermore, the prosecutor deliberately exploited the facial narrowness of the special issues by insisting that Mr. Cole's jurors answer them solely on the basis of the evidence, without regard to their consequences for the penalty to be imposed. Under these circumstances, the CCA applied *Penry* in an objectively

unreasonable manner in finding that the jury had any meaningful way under its instructions to respond to the relevant mitigating qualities of Mr. Cole's mistreatment as a child, the emotional and psychological damage which that traumatic history caused him as an adult, and the diminished impulse control Mr. Cole suffers due to the destructive combination of his turbulent personal history and an underlying organic neurological dysfunction.

Mr. Cole's death sentence violates *Penry*. This Court should reverse the Fifth Circuit and remand with instructions to grant habeas corpus relief.

Respectfully submitted,

ROBERT C. OWEN*
CAPITAL PUNISHMENT CENTER
UNIVERSITY OF TEXAS
SCHOOL OF LAW
727 East Dean Keeton
Austin, TX 78705
(512) 232-9391
(512) 232-9171 (facsimile)
**Counsel of Record*
for Petitioner

RAOUL D. SCHONEMANN
3774 Harrison Street
Oakland, CA 94611
(510) 654-1192
(415) 904-5635 (facsimile)

JORDAN M. STEIKER
CAPITAL PUNISHMENT CENTER
UNIVERSITY OF TEXAS
SCHOOL OF LAW
727 East Dean Keeton
Austin, TX 78705
(512) 232-1346
(512) 232-2399 (facsimile)

(6)

No. 05-11284

FILED
JAN 2 - 2006
CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

JALIL ABDUL-KABIR, formerly known as TED CALVIN COLE,

Petitioner,

v.

NATHANIEL QUARTERMAN, Director, Texas Department of Criminal Justice, Correctional Institutions Division,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF RESPONDENT

GREG ABBOTT
Attorney General of Texas

KENT C. SULLIVAN
First Assistant Attorney General

ERIC J.R. NICHOLS
Deputy Attorney General for Criminal Justice

**Counsel of Record*

GENA BUNN
Chief, Postconviction Litigation Division

**EDWARD L. MARSHALL
Deputy Chief, Postconviction Litigation Division

CARLA E. ELDRED
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 936-1400

ATTORNEYS FOR RESPONDENT

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Was Cole's mitigating evidence of childhood neglect and possible neurological dysfunction sufficiently within the jury's effective reach when it answered the pre-1991 Texas capital-sentencing special issues, which required the jury to determine whether the defendant's murderous conduct was deliberate and whether there was a probability he would commit further acts of criminal violence?

2. Did this Court's opinions in *Penry v. Johnson,* 532 U.S. 782 (2001), and *Smith v. Texas,* 543 U.S. 37 (2004), overrule *Jurek v. Texas,* 428 U.S. 262 (1976), *Graham v. Collins,* 506 U.S. 461 (1993), and *Johnson v. Texas,* 509 U.S. 350 (1993), and their Fifth Circuit progeny, which held that most types of mitigating evidence will find sufficient effect within the former special issues?

3. Does the lower court's holding – that treatable mental problems are within the effective reach of a sentencing jury in answering the pre-1991 special issues – impermissibly resurrect the threshold test for "constitutional relevance" that this Court rejected in *Tennard v. Dretke,* 542 U.S. 274 (2004)?

4. When the prosecution implored jurors to "follow the law" and "do their duty" in answering the former Texas special issues, is there "a reasonable probability that the jury has applied the . . . [special-issue] instructions in a way that prevents the consideration of constitutionally relevant evidence," *Boyde v. California,* 494 U.S. 370, 380 (1990)?

TABLE OF CONTENTS

		Page
STATEMENT OF THE CASE		1
I.	Facts of the Crime	1
II.	Facts Relating to Punishment	3
III.	Direct Appeal and Postconviction Proceedings in State Court	7
IV.	Federal Habeas Corpus Proceedings	8
SUMMARY OF THE ARGUMENT		11
ARGUMENT		12
I.	Standard of Review	12
II.	*Penry I* and Its Progeny Demand a Case-by-Case Inquiry into the Mitigating Significance of the Evidence Presented and Whether the Jury Was Able to Give Sufficient Effect to That Evidence Within the Scope of the Special Issues	14
A.	*Jurek* to *Penry I* to *Johnson*: almost all types of mitigating evidence may be sufficiently considered in answering the former Texas special issues	15
B.	*Penry II* did not alter the Court's *Jurek/Penry I/Johnson* jurisprudence, nor did it justify a change in perception among the lower courts	22
C.	*Tennard, Smith,* and the new standard of constitutional relevance	25
D.	The current state of *Penry I* jurisprudence	28

TABLE OF CONTENTS – Continued

Page

III. The Court Below Properly Rejected Cole's *Penry I* Claim 30

IV. The State Court Reasonably Rejected Cole's *Penry I* Claim 40

CONCLUSION 44

TABLE OF AUTHORITIES

Page

CASES

Adams v. Texas, 448 U.S. 38 (1980) 20

Ayers v. Belmontes, 127 S. Ct. 469 (2006) 21, 24

Bigby v. Dretke, 402 F.3d 551 (5th Cir.), *cert. denied*, 126 S. Ct. 239 (2005) 28, 37

Blystone v. Pennsylvania, 494 U.S. 299 (1990) 20, 24

Booth v. Maryland, 482 U.S. 496 (1987) 16

Boyde v. California, 494 U.S. 370 (1990) ..... *passim*

Brewer v. Dretke, 442 F.3d 273 (5th Cir.), *cert. granted*, 127 S. Ct. 433 (2006) 28, 29

Brown v. Payton, 544 U.S. 133 (2004) 41

Buchanan v. Angelone, 522 U.S. 269 (1998) 16, 21

Butler v. McKellar, 494 U.S. 407 (1990) 42

California v. Brown, 479 U.S. 538 (1987) 16

Caspari v. Bohlen, 510 U.S. 383 (1994) 42

Coble v. Dretke, 444 F.3d 345 (5th Cir. 2006) 28, 33, 37

Cruz v. Miller, 255 F.3d 77 (2d Cir. 2001) 14, 41

Demouchette v. Collins, 972 F.2d 651 (5th Cir. 1992) 37

Eddings v. Oklahoma, 455 U.S. 104 (1982) ... 15, 16, 17, 19, 21

Ex parte Smith, 132 S.W.3d 407 (Tex. Crim. App. 2004) 27

Franklin v. Lynaugh, 487 U.S. 164 (1988) ..... *passim*

Furman v. Georgia, 408 U.S. 238 (1972) 21

Goeke v. Branch, 514 U.S. 115 (1995) 42

Graham v. Collins, 506 U.S. 461 (1993) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Graham v. Collins, 896 F.2d 893 (5th Cir. 1990) 31

Graham v. Collins, 950 F.2d 1009 (5th Cir. 1992) (*en banc*) 31

Gregg v. Georgia, 428 U.S. 153 (1976) 21

Harris v. Cockrell, 313 F.3d 238 (5th Cir. 2002), *cert. denied*, 540 U.S. 1218 (2004) 25, 38

Hernandez v. Johnson, 248 F.3d 344 (5th Cir.), *cert. denied*, 534 U.S. 1043 (2001) 25, 37

Jacobs v. Scott, 31 F.3d 1319 (5th Cir. 1994) 32, 33

James v. Collins, 987 F.2d 1116 (5th Cir. 1993) 38

Johnson v. Texas, 509 U.S. 350 (1993) ..... *passim*

Jurek v. Texas, 428 U.S. 262 (1976) ..... *passim*

Lockett v. Ohio, 438 U.S. 586 (1978) 15, 17, 19, 21

Long v. Humphrey, 184 F.3d 758 (8th Cir. 1999) 14

Lucas v. Johnson, 132 F.3d 1069 (5th Cir. 1998) 35

Madden v. Collins, 18 F.3d 304 (5th Cir. 1994) 28

Matteo v. Superintendent, 171 F.3d 877 (3d Cir. 1999) (*en banc*) 14, 41

McKoy v. North Carolina, 494 U.S. 433 (1990) 26

Neal v. Puckett, 286 F.3d 230 (5th Cir. 2002) (*en banc*) 14

Nelson v. Quarterman, ___ F.3d ___, 2006 WL 3592953 (5th Cir. Dec. 11, 2006) (*en banc*) 35, 36, 37

Newton v. Dretke, 371 F.3d 250 (5th Cir.) *cert. denied*, 543 U.S. 964 (2004) 25

Payne v. Tennessee, 501 U.S. 808 (1991) 16

Penry v. Johnson, 532 U.S. 782 (2001) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Penry v. Lynaugh, 492 U.S. 302 (1989) ..... *passim*

Robertson v. Cockrell, 325 F.3d 243 (5th Cir.) (*en banc*), *cert. denied*, 539 U.S. 979 (2003) 25, 27

Robison v. Johnson, 151 F.3d 256 (5th Cir. 1998) 37

Saffle v. Parks, 494 U.S. 484 (1990) 18

Saiz v. Ortiz, 392 F.3d 1166 (10th Cir. 2004), *cert. denied*, 125 S. Ct. 2976 (2005) 14, 41

Santellan v. Cockrell, 271 F.3d 190 (5th Cir. 2001) 14, 41

Skipper v. South Carolina, 476 U.S. 1 (1986) 16

Smith v. Texas, 543 U.S. 37 (2004) ..... *passim*

Teague v. Lane, 489 U.S. 288 (1989) 19

Tennard v. Cockrell, 284 F.3d 491 (5th Cir. 2002) 25

Tennard v. Dretke, 442 F.3d 240 (5th Cir. 2006) 28, 37

Tennard v. Dretke, 542 U.S. 274 (2004) ..... *passim*

Tuilaepa v. California, 512 U.S. 967 (1994) 21

Williams v. Taylor, 529 U.S. 362 (2000) 8, 13

Woodford v. Visciotti, 537 U.S. 19 (2002) 13

Woodson v. North Carolina, 428 U.S. 280 (1976) 14, 15, 16

Wright v. Dep't of Corr., 278 F.3d 1245 (11th Cir. 2002) 14, 41

Yarborough v. Alvarado, 541 U.S. 652 (2004) 14

Zant v. Stephens, 462 U.S. 862 (1983) 16

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONS, STATUTES AND RULES

U.S. Const., amend. VIII ..... *passim*

TEX. CODE CRIM. PROC. art. 37.071(b) (West 1987) 6

TEX. CODE CRIM. PROC. art. 37.071(2)(e)(1) (West 1991) 24

28 U.S.C. § 2254(a) 42

28 U.S.C. § 2254(d) (West 2006) 12, 42

MISCELLANEOUS

Anti-Terrorism and Effective Death Penalty Act of 1996 12

THE AMERICAN HERITAGE COLLEGE DICTIONARY (3d ed. 2000) 38

This Court should affirm the lower court's judgment affirming the denial of habeas corpus relief. The Court of Criminal Appeals of Texas identified the correct federal authority—divined from this Court's opinions as of 1999—and reasonably applied it to Petitioner Ted Calvin Cole's[1] claim under *Penry v. Lynaugh*, 492 U.S. 302 (1989) (*Penry I*), during state habeas corpus proceedings. Moreover, assuming *arguendo* the state court decision was unreasonable, Cole fails to demonstrate a reasonable likelihood that his sentencing jury was unable to give sufficient mitigating effect to his evidence of childhood neglect and potential neurological dysfunction in answering the former Texas special issues. Nothing in this Court's intervening opinions in *Smith v. Texas*, 543 U.S. 37 (2004), *Tennard v. Dretke*, 542 U.S. 274 (2004), or *Penry v. Johnson*, 532 U.S. 782 (2001) (*Penry II*), dictates a different result. As a result, habeas corpus relief is not available to Cole.

STATEMENT OF THE CASE

I. Facts of the Crime

The facts supporting Cole's capital murder conviction are summarized in the lower court's published opinion as follows:

> In December 1987, Cole was staying at an abandoned motel [in San Angelo, Texas] with his

[1] Respondent Nathaniel Quarterman will be referred to herein as "the Director." "JA" refers to the Joint Appendix, followed by page numbers. "RR" refers to the Reporter's Record of transcribed trial proceedings, preceded by volume number and followed by page numbers. "SX" refers to the numbered exhibits offered by the State and admitted into evidence at trial.

stepbrother, Michael Hickey ("Michael"), and Michael's wife, Kelly Hickey ("Kelly"). Cole mentioned to the Hickeys that he was willing to kill someone to obtain cash.[2] Cole and Michael decided to rob Kelly's grandfather, Raymond Richardson,[3] and then strangle him to death.

Two days after this conversation, Cole, Michael, and Kelly went to Richardson's home and visited with him in his living room for several hours. The group moved to the kitchen. As Richardson left the kitchen, Cole pushed him to the floor, where Richardson landed face down. Cole then sat on Richardson's back and strangled him with a dog leash that the men had brought to the house for this purpose. After Richardson died, the group put his body under his bed. They searched the house for cash, finding twenty dollars in Richardson's wallet. Michael took the money from the wallet, and Cole took the money to the grocery store to buy beer and bacon. Cole returned to Richardson's house and shared the groceries with Michael. The morning after the murder, Kelly and Michael surrendered themselves to the police and gave statements. Kelly eventually testified at Cole's trial.

The police arrested Cole at Richardson's home the morning after the murder. Cole gave the police two statements in which he confessed to having murdered Richardson. The statements were

---

[2] Cole and Michael planned to abscond to Florida with the money obtained from the crime. 15 RR 426. They previously attempted to leave Texas for Colorado but were forced to turn back after running out of money. *Id.* at 434.

[3] Richardson was sixty-six years old and legally blind. 15 RR 306-07.

> introduced against Cole at trial. In one of these statements, Cole admitted that the group decided to strangle Richardson because "it was quiter [*sic*] then [*sic*] shooting him and not as messy as cutting his throat, and it just seemed the easiest way to do it." [On June 4, 1988,] [t]he jury found Cole guilty of the capital murder of Richardson while in the course of committing and attempting to commit robbery.

JA:220-21 (*Cole v. Dretke,* 418 F.3d 494, 496-97 (5th Cir. 2005)).

II. Facts Relating to Punishment

Cole's mother, Nancy Hickey, testified for the defense that Cole's father abandoned his family when Cole was five or six years old. JA:35-36. Ms. Hickey was a self-described "drunk" and unable to care for her two children by herself. *Id.* at 36-37. Thus, she moved to Oklahoma to live with her parents. *Id.* at 36. But no school buses ran in the area and Cole's grandfather refused to allow Ms. Hickey to use his car to take Cole to school. *Id.* As a result, Ms. Hickey placed Cole into a children's home operated by her parents' church so he would be able to attend school. *Id.* at 36-37. Cole remained there for four or five years. *Id.* at 37, 56.

Cole returned home to live with his mother—now remarried and sober—in San Angelo when he was ten or eleven years old. JA:39-40. Cole made good grades in school and eventually reunited with his father—who was attending seminary school—at about age fifteen. *Id.* at 41-43. Cole lived with his father in Dallas for a year before returning to San Angelo. *Id.* at 43-44.

It was at this point in 1973, when Cole was sixteen years old, that he murdered his best friend by shooting him in the throat just "to see what it was like." 17 RR 697-99, 708-09. For this first-degree murder, Cole was sentenced to two to fifteen years confinement after pleading guilty. 18 RR 49-56 (SX36). Cole was paroled in 1980 but soon found himself in trouble again after repeatedly orally and anally raping two young boys. 17 RR 724-30, 785. Cole pleaded guilty, his parole was revoked, and he was sentenced to fifteen years in prison for aggravated sexual abuse of a child. 18 RR 57-63 (SX37).

The State presented expert testimony from psychiatrist Richard Coons who, along with psychologist George Parker, examined Cole prior to trial. JA:9, 18-19, 21. Dr. Coons determined that Cole exhibited "a number of sociopathic antisocial personality features," namely a lack of remorse or conscience. *Id.* at 22-25. Dr. Coons noted, for example, that Cole's diary reflected "a desire for homosexual pedophilia . . . and a knowledge that it's wrong." *Id.* at 26. Although Dr. Coons stated that sociopathic persons could not profit or learn from their experiences, he specifically declined to diagnose Cole as such. *Id.* at 30-32.

The defense presented expert evidence from psychologist Jarvis Wright who also examined Cole in preparation for trial. JA:60-62. Dr. Wright determined that Cole's intelligence quotient (IQ) was 121, but that he had a fragmented personality because of his "very rugged, rough childhood." *Id.* at 63, 67. Consequently, Cole lacks proper impulse control and seeks immediate gratification. *Id.* at 69-70. Dr. Wright speculated that Cole might suffer from neurological dysfunction in his central nervous system, but could not say whether there was actual damage. *Id.* at 69-70, 77-78. In sum, Dr. Wright testified that Cole was

"bright, very bright, sizzling bright" but "extremely depressed."[4] *Id.* at 73, 86. In his opinion, Cole would be dangerous "on the street" but would "mellow" and "burn out" within ten years. *Id.* at 68, 73-74. In addition, Dr. Wright stated that Cole's long history of incarceration suggested that he would function best within the "routine, disciplined, highly-structured" lifestyle of prison. *Id.* at 74-75.

Psychologist Wendell Dickerson also testified for the defense and stated that future dangerousness is very hard to predict and, in fact, such predictions are wrong "twice as often as" they are right, or two-thirds of the time. JA:93-94. He further opined that violent conduct diminishes with age and becomes "fairly rare" by the time individuals reach the age of forty. *Id.* at 95. Dr. Dickerson also averred that "most of the people [in prison] could probably be diagnosed as 'sociopath' in one way or another" in that they are lawbreakers without apparent mental problems. *Id.* at 97-98. Most of these individuals, once institutionalized, "go on about their business and live their life" without incident. *Id.* at 99. The incorrigible inmates are isolated and referred for psychiatric treatment, effectively controlling aggressive behavior. *Id.* Dr. Dickerson declined to reach a conclusion concerning Cole's future dangerousness because he had not examined him. *Id.* at 101.

The jury was then charged with answering the two special issues submitted in all Texas capital prosecutions

---

[4] Cole attempted suicide while incarcerated awaiting trial. JA:66. However, Dr. Wright testified that it was not unusual for a person standing trial for capital murder to be so depressed. *Id.* at 86.

prior to 1991. JA:127-29; *see also* TEX. CODE CRIM. PROC. art. 37.071(b) (West 1987). The "deliberateness" special issue asked if "the conduct of the defendant ... that caused the death of the deceased ... [was] committed deliberately and with the reasonable expectation that the death of the deceased or another would result?" JA:127. The "future dangerousness" special issue queried the jury whether there was "a probability that the defendant ... would commit criminal acts of violence that would constitute a continuing threat to society." *Id.* at 128. The jury was instructed that, "in determining each of these special issues," it could "take into consideration all of the evidence submitted." *Id.* at 126; 17 RR 865.

During closing argument, defense counsel recalled Dr. Dickerson's testimony regarding predictions of future dangerousness as well as Dr. Wright's opinions concerning "burn out." JA:141-42. Stressing the State's burden of proof beyond a reasonable doubt, defense counsel argued that the prosecution failed to prove Cole would commit future acts of violence. *Id.* at 142. Defense counsel also noted Cole's tumultuous childhood and suggested that "[t]he only peace he ever finds is in the penitentiary ... that's the only life he's ever known." *Id.* at 142-43.

The State countered that it had met its burden of proof and that there was no reasonable doubt regarding Cole's future dangerousness. JA:137, 140, 145, 147-48. However, the prosecutor did not argue to the jury that Cole's mitigating evidence was irrelevant or that it supported affirmative answers to the special issues. On June 4, 1988, the jury answered both special issues "yes" and the trial court assessed a sentence of death. *Id.* at 127-30.

III. Direct Appeal and Postconviction Proceedings in State Court

On September 26, 1990, the Court of Criminal Appeals of Texas affirmed Cole's conviction and sentence, and this Court denied certiorari review. *Cole v. State,* No. 70,401 (Tex. Crim. App. 1990) (unpublished, *per curiam* opinion), *cert. denied,* 499 U.S. 982 (1991).

Cole then filed an application for habeas corpus relief in state court asserting, *inter alia,* that the jury was unable to give sufficient effect to his mitigating evidence in violation of *Penry I.* JA:154. The trial court considered Cole's claim under *Penry I* and *Graham v. Collins,* 506 U.S. 461 (1993), and, on May 10, 1999, found that his evidence was placed within the jury's effective reach, especially by the expert testimony of Drs. Wright and Dickerson. JA:157-61.

Specifically, the court noted Dr. Wright's opinion that Cole would "mellow and change a good bit," or "burn out" as he aged, as well as Dr. Dickerson's belief that this change made individuals like Cole less dangerous. JA:160-61. The court concluded this testimony "provide[d] a basis for the jury to sufficiently consider the mitigating evidence offered by [Cole]" in answering the future-dangerousness special issue. *Id.* at 161.

On November 24, 1999, the Court of Criminal Appeals adopted these findings and conclusions and denied relief. JA:178-79 (*Ex parte Cole,* No. 41,673-01 (Tex. Crim. App. 1999) (unpublished, *per curiam* order)). Cole did not seek certiorari review.

IV. Federal Habeas Corpus Proceedings

Cole subsequently raised his *Penry I* claim in a petition for habeas corpus relief in the United States District Court for the Northern District of Texas, San Angelo Division. JA:1. Thereafter, on March 6, 2001, the district court below held that the state court's rejection of Cole's claim was not contrary to, or an unreasonable application of, this Court's *Penry I* jurisprudence. *Id.* at 197 (*Cole v. Johnson,* No. 6:00-CV-14-C (N.D. Tex. 2001) (unpublished order)) (citing *Williams v. Taylor,* 529 U.S. 362 (2000)). The court first explained that evidence of a "destructive family background could be considered under the future dangerousness special issue," based on Fifth Circuit precedent. *Id.* at 195-96. Second, the court held that Cole's putative organic neurological deficiency and resultant lack of impulse control "could be considered under either the deliberateness or the future dangerousness special issues."[5] *Id.* at 194, 196. This is because "[t]estimony regarding Cole's lack of impulse control was offered to explain the offense and demonstrate a capacity for change through his 'outgrowing' the impulsivity over time. The relevance of this evidence to the future dangerousness inquiry of the second issue is readily apparent." *Id.* at 196.

The United States Court of Appeals for the Fifth Circuit initially denied a certificate of appealability (COA) regarding Cole's *Penry I* claim. JA:4 (*Cole v. Cockrell,* No. 01-10646 (5th Cir. 2003) (unpublished, nondispositive opinion)). The court of appeals later declined to reconsider

---

[5] The district court also noted that "[t]he evidence is entirely insufficient to prove that Cole did, in fact, suffer from an organic neurological deficit . . . [or] from any organic brain damage." JA:194. However, this conclusion was rejected on appeal. *Id.* at 230-31 n.31.

its ruling in light of this Court's grants of certiorari in *Smith* and *Tennard*. JA:6 (*Cole v. Dretke*, 99 Fed.Appx. 523, 533 (5th Cir. 2004) (unpublished, *per curiam* opinion)). However, on November 15, 2004, this Court granted Cole's petition for writ of certiorari, vacated the lower court's judgment denying a COA, and remanded for further consideration in light of *Tennard*. *Abdul-Kabir v. Dretke*, 543 U.S. 985 (2004).

On remand, the court below granted a COA and initially determined that Cole's mitigating evidence—of a "turbulent family background" and "organic neurological deficiency"—met "the low threshold for relevance as articulated by the *Tennard* Court." JA:227-32 (citing *Tennard*, 542 U.S. at 284-85). The court of appeals then applied *Penry I*, *Graham*, *Johnson v. Texas*, 509 U.S. 350 (1993), *Penry II*, *Tennard*, and *Smith* to determine "whether the special issues are broad enough to encompass Cole's mitigating evidence." JA:232-50. "Unlike the evidence in *Penry*," the court explained:

> Cole's mitigating evidence did not suggest that he was unable to learn from his mistakes. The record does not suggest that the jury viewed Cole's mitigating evidence as an aggravating factor only, *i.e.*, because he cannot learn from his mistakes, he will remain a danger in the future. Rather, the evidence proffered by Cole's expert witnesses suggested to the jury that Cole could change in the future. The evidence intimated that someone from Cole's abusive background begins to change later in life. This evidence also suggests that even someone with . . . an organic neurological deficiency changes later in life. That this evidence fits well within the broad scope of the future dangerousness special issue is clearly

> evident from the testimony of Cole's own expert witnesses.

Id. at 242-43 (footnote omitted).

Further, the lower court noted that Cole's "family background" or evidence of his "transient upbringing" was well within the scope of the Texas special issues because it "more closely resembles Jurek's[6] evidence of age, employment history, and familial ties than it does Penry's evidence of mental retardation and harsh physical abuse." JA:243 (quoting *Graham,* 506 U.S. at 476). "Given the experts' testimony during the punishment phase, the jury could have believed them and found that, although Cole suffered a turbulent childhood and may suffer from diminished impulse control, he is capable of change and thus would not necessarily remain a danger in the future." *Id.* at 244.

Moreover, "[t]he state prosecutor did not ask the jury to consider Cole's mitigating evidence as aggravating" or argue that it "was irrelevant in mitigation." JA:245 (citing *Tennard,* 542 U.S. at 289). Finally, the court rejected Cole's suggestion that his jury was given a nullification instruction as in *Penry II* and *Smith. Id.* at 246-49 & n.66. As a result, the panel unanimously affirmed the district court's denial of habeas relief. *Id.* at 250. The court also denied rehearing *en banc* on March 17, 2006 with only two of sixteen circuit judges in dissent. *Id.* at 8 (*Cole v. Dretke,* 443 F.3d 441 (5th Cir. 2006) (*per curiam*)). This Court granted certiorari review on October 13, 2006. *Id.* at 251 (*Abdul-Kabir v. Quarterman,* 127 S. Ct. 432 (2006)).

---

[6] *Jurek v. Texas,* 428 U.S. 262 (1976).

SUMMARY OF THE ARGUMENT

The court below properly affirmed the denial of federal habeas corpus relief because the state court did not unreasonably apply clearly-established federal law as of 1999 in denying postconviction relief to Cole. This well-established Supreme Court precedent demands a case-by-case inquiry into whether the sentencing jury was able to give sufficient effect to a defendant's mitigating evidence in answering the former Texas special issues concerning deliberateness and future dangerousness. Moreover, this Court has made it abundantly clear that almost all types of mitigating evidence may be sufficiently considered under the special issue scheme and that *Penry I* is the notable exception to the rule. This is true even where mitigating evidence—such as Cole's evidence of childhood neglect and a potential neurological dysfunction—may have some arguable relevance outside the special issues as well. All the Eighth Amendment requires is that a jury be able to consider Cole's mitigating evidence *in some manner.*

There is no principled distinction between Cole's evidence of an alcoholic mother who placed him in a children's home for several years and the evidence of a difficult childhood considered by this Court in *Graham.* There is also no meaningful similarity between Cole's childhood troubles and the severe abuse and deprivation which occurred in *Penry I.* Similarly, Cole's possible neurological problems, which were most likely to recede within ten years, do not bear any real resemblance to the permanent mental retardation and brain damage in *Penry I.* Indeed, Cole had an IQ of 121. In any event, the jury heard expert testimony that Cole—who had already spent much of his life in prison without violent incident—would

not be dangerous if sentenced to life imprisonment. Thus, his mitigating evidence had no *aggravating* relevance within the future-dangerousness special issue. In short, the relationship between the special issues and Cole's mitigating evidence completely lacks the same essential features as the relationship between the special issues and evidence such as mental retardation or low IQ. Any contrary holding would make *Penry I* the rule rather than the exception. As a result, the lower court's judgment should be affirmed.

ARGUMENT

I. Standard of Review

This proceeding is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which states in relevant part that:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d) (West 2006).

This Court has held that a state court decision is "contrary" to established federal law if the state court "applies a rule that contradicts the governing law set forth in [the Court's] cases," or confronts facts that are "materially indistinguishable" from a relevant Supreme Court case, yet reaches an opposite result. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). Here, where the state court correctly identified the controlling Supreme Court precedent, the unreasonable application test of § 2254(d)(1) applies. *Id.* at 406-08. A state court "unreasonably applies" clearly established federal law if it recognizes the governing precedent but unreasonably applies it to the facts of a particular case. *Id.* at 407-09.

A federal habeas court's inquiry into reasonableness should be objective rather than subjective, and a court should not issue the writ simply because that court concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly. *Williams*, 529 U.S. at 409-11. Rather, federal habeas relief is only merited where the state court decision is both incorrect *and* objectively unreasonable, "whether or not [this Court] would reach the same conclusion." *Id.* at 411; *Woodford v. Visciotti*, 537 U.S. 19, 27 (2002). As this Court explained:

> [T]he range of reasonable judgment can depend in part on the nature of the relevant rule. If a legal rule is specific, the range may be narrow. Applications of the rule may be plainly correct or incorrect. Other rules are more general, and their meaning must emerge in application over the course of time. Applying a general standard to a specific case can demand a substantial element of judgment. As a result, evaluating whether a rule application was unreasonable requires considering

> the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case by case determinations.

Yarborough v. Alvarado, 541 U.S. 652, 664 (2004). Here, where the state court applied the broad Eighth Amendment rule of *Penry I* to the unique mitigating evidence in Cole's case, that court's judgment is entitled to maximum leeway under the AEDPA.

Finally, it is the state court's ultimate decision denying relief that is to be tested for unreasonableness, not its reasoning. *Saiz v. Ortiz,* 392 F.3d 1166, 1176 (10th Cir. 2004), *cert. denied,* 125 S. Ct. 2976 (2005); *Wright v. Dep't of Corr.,* 278 F.3d 1245, 1255 (11th Cir. 2002); *Santellan v. Cockrell,* 271 F.3d 190, 193 (5th Cir. 2001); *Cruz v. Miller,* 255 F.3d 77, 86 (2d Cir. 2001); *Long v. Humphrey,* 184 F.3d 758, 760-61 (8th Cir. 1999); *Matteo v. Superintendent,* 171 F.3d 877, 891 (3d Cir. 1999) (*en banc*); *see also Neal v. Puckett,* 286 F.3d 230, 246 (5th Cir. 2002) (*en banc*) (holding that a federal court's "focus on the 'unreasonable application' test under section 2254(d) should be on the ultimate legal conclusion that the state court reached and not on whether the state court considered and discussed every angle of the evidence").

II. *Penry I* and Its Progeny Demand a Case-by-Case Inquiry into the Mitigating Significance of the Evidence Presented and Whether the Jury Was Able to Give Sufficient Effect to That Evidence Within the Scope of the Special Issues.

In *Penry I,* this Court was forced to reconcile its plurality opinions in *Woodson v. North Carolina,* 428 U.S. 280, 303-04 (1976) (which requires that a capital-sentencing

authority be allowed to consider mitigating circumstances), *Jurek,* 428 U.S. at 276 (explaining that the pre-1991 Texas special issues—deliberateness and future dangerousness—allowed Texas juries to consider mitigating circumstances), and the unique, double-edged mitigating circumstances presented in *Penry I* itself (mental retardation, brain damage, and severe child abuse). 492 U.S. at 320-25. The resultant decision was a carefully crafted and, ultimately, case-specific compromise. Indeed, the successor cases in this Court have demonstrated one crucial principle: *Penry I* remains the rare exception to the general rule of *Jurek.*

A. *Jurek* to *Penry I* to *Johnson*: almost all types of mitigating evidence may be sufficiently considered in answering the former Texas special issues.

At the root of *Penry I* are found the competing interests involved in capital sentencing: the requirement for an individualized determination of moral culpability based on both aggravating and mitigating factors, and the need to adequately guide and channel a jury's consideration of these factors. The *Woodson* line of cases first construed the Eighth Amendment to require that a capital-sentencing jury not be precluded *as a matter of law* from consideration, as a mitigating factor, of the character and record of the individual offender, as well as the circumstances of the particular offense. *Eddings v. Oklahoma,* 455 U.S. 104, 111-12 (1982); *Lockett v. Ohio,* 438 U.S. 586, 604 (1978) (plurality opinion); *Woodson,* 428 U.S. at 303-04.

As the Court explained, "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who

commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *Penry I,* 492 U.S. at 319 (quoting *California v. Brown,* 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)). However, not all evidence presented as mitigating must be considered as such. *Franklin v. Lynaugh,* 487 U.S. 164, 174 (1988) (plurality opinion); *Skipper v. South Carolina,* 476 U.S. 1, 7 n.2 (1986). Nor is it constitutionally required that consideration of mitigating evidence be structured or balanced in any particular way. *Buchanan v. Angelone,* 522 U.S. 269, 276-77 (1998); *Franklin,* 487 U.S. at 179; *Booth v. Maryland,* 482 U.S. 496, 502 (1987), *overruled on other grounds, Payne v. Tennessee,* 501 U.S. 808 (1991); *Zant v. Stephens,* 462 U.S. 862, 875-76 (1983).

Prior to the development of the rule in *Eddings,* the *Jurek* plurality held that the Texas special issues were constitutional because "the enumerated questions allow consideration of particularized mitigating factors," *e.g.,* a defendant's criminal record (or lack thereof), the range of severity of such a record, his youth, the circumstances of the crime, duress and mental or emotional disturbance, and remorse. 428 U.S. at 272-73. Jurek's mitigating evidence of good character, youth, and intoxication was sufficiently within the ambit of the future-dangerousness special issue to satisfy the "individualized sentencing determination" required by *Woodson. Id.* at 271-73. And, in *Franklin,* the Court first recognized that the special issues were constitutionally sufficient even where the mitigating evidence had relevance to culpability apart from the concerns embodied in the deliberateness and future-dangerousness questions. 487 U.S. at 177-82. The Court specifically rejected the notion that the forward-looking

future-dangerousness inquiry was inadequate for the consideration of backward-looking character evidence. *Id.* at 177-78; *cf. id.* at 189-90 (arguing that good-character evidence was *not* within the scope of the future-dangerousness issue because it might have relevance to past culpability rather than future conduct) (Stevens, J., dissenting). Commonsense dictates that the individualized-determination doctrine of *Lockett* and *Eddings* must yield to the requirement that a capital-sentencing jury receive guidance in its decision-making at some point. Otherwise, *Jurek* is without meaning. As the Court explained:

> *Lockett* does not hold that the State has no role in structuring or giving shape to the jury's consideration of these mitigating factors. Given the awesome power that a sentencing jury must exercise in a capital case, it may be advisable for a State to provide the jury with some framework for discharging these responsibilities.

Franklin, 487 U.S. at 179 (citation omitted).

Thereafter, the *Penry I* Court held that the Texas special issues, as applied to Penry, did *not* allow consideration of his specific evidence of mental retardation, brain damage, and severe child abuse. 492 U.S. at 322. This was because the evidence, which suggested that Penry was "less able . . . to control his impulses or to evaluate the consequences of his conduct," did not necessarily suggest that his murderous actions were less than deliberate. *Id.* Additionally, Penry's evidence indicated that he was unable to "learn from his mistakes," and was relevant to the future-dangerousness special issue *only* as an *aggravating* factor. *Id.* at 323. Thus, neither special issue provided a vehicle for the jury to give mitigating effect to

Penry's "two-edged" evidence. *Id.* at 324. Yet the Court specifically noted that its *Penry I* opinion did *not* negate the facial validity of the Texas special issues, nor did it change the fact that other types of mitigating evidence *could* be considered under the plain language of the special issues. *Id.* at 315-19. For more than a decade *Penry I* would be viewed as the narrow exception to *Jurek*.

During its next term, the Court acknowledged the "strong policy against retrials years after the first trial where the claimed error amounts to no more than speculation." *Boyde v. California,* 494 U.S. 370, 380 (1990). Accuracy is important, but finality equally so. *Id.* Indeed, "[j]urors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might." *Id.* at 380-81. As a result, the Court crafted a legal standard for reviewing ambiguous jury instructions that relies not on subjective and hypothetical hairsplitting but on objective and reasonable analysis. *Id.* at 378-81. The Court held that a *mere possibility* that the jury was precluded from considering relevant mitigating evidence did *not* establish Eighth Amendment error. *Id.* at 380. Rather, such error occurred only if there was a "reasonable likelihood" that the jury applied its instructions in a way that prevented the consideration of such evidence. *Id.*; *see also Saffle v. Parks,* 494 U.S. 484, 490-92 (1990) (no Eighth Amendment error where there is no indication that the jury was "altogether prevented" from giving some effect to the evidence).

The Court would continue to endorse *Jurek* and limit the application of *Penry I* where the mitigating evidence presented was not *solely aggravating* when viewed through the lens of the special issues. For example, in *Graham,* the Court declined to "read *Penry* [*I*] to effect a

sea change in the Court's view of the constitutionality of the . . . Texas death penalty statute."[7] 506 U.S. at 474. As in *Franklin,* the Court found that future dangerousness was a constitutionally adequate vehicle for the consideration of his mitigating evidence of youth, troubled upbringing, and good character. *Graham,* 506 U.S. at 475. This was because the "mitigating significance" of Graham's evidence did not *compel* affirmative answers to the special issues as did Penry's evidence, but instead suggested that Graham would *not* be a future danger. *Id.* at 475-76.

Thus, as in *Boyde,* the possibility that mitigating evidence might have "*some* arguable relevance beyond the special issues" was immaterial as long as the jury was able to give effect to the evidence in some meaningful way. *Id.* at 476 (emphasis in original). Indeed, "virtually *any* mitigating evidence" can be characterized as relevant to culpability but outside the scope of the Texas special issues. *Id.* (emphasis in original). In his dissent, Justice Souter ably demonstrated how to do so. *Id.* at 518-21 (suggesting youth and difficult upbringing, *i.e.,* "his mother's mental illness and repeated hospitalization, and his shifting custody to one family relation or another" had mitigating relevance outside or aggravating relevance within the future-dangerousness question). But if this idea

---

[7] Cole avers that *Penry I* was not at issue in *Graham* because it merely applied the retroactivity doctrine of *Teague v. Lane,* 489 U.S. 288 (1989), in order to determine the state of the law in 1984, presumably when Graham's sentence became final. Petitioner's Brief (Brief) at 35. This is nonsense. In *Penry I,* the Court held that relief was dictated by *Lockett* and *Eddings,* decided in 1978 and 1982, respectively. 492 U.S. at 318-19. *Graham* decided that *Lockett* and *Eddings* did not dictate relief *on the facts of Graham's case,* and that *Penry I* was distinguishable *on its facts.* 506 U.S. at 472-77.

was followed to its logical conclusion, the Court noted, *Penry I* would have swallowed *Jurek* completely. *Id.* at 476-77. Such reasoning is inconsistent with *Jurek* and *Franklin.*

In *Johnson,* the Court again rejected the notion that a jury could ever view youth "as outside its effective reach in answering the [future-dangerousness] special issue." 509 U.S. at 368. This is so even if youth could also be viewed as aggravating; constitutional error results only if the evidence is unavoidably aggravating within the context of the special issues. *Id.* at 368-69. Again, the Court specifically rejected the notion that mitigating evidence must be allowed relevance in every way imaginable during sentencing. The Court explained that general "personal culpability" is, by its nature, intertwined with the notion of future dangerousness. *Id.* at 369-70. This is because "a Texas capital jury deliberating over the Special Issues is *aware of the consequences* of its answers," and is understood to "exercise a range of judgment and discretion" and basic "commonsense" in answering those issues. *Id.* at 370 (quoting *Adams v. Texas,* 448 U.S. 38, 46 (1980), and citing *Boyde,* 494 U.S. at 381, and *Franklin,* 487 U.S. at 182 n.12) (emphasis added); *cf. Blystone v. Pennsylvania,* 494 U.S. 299, 322 (1990) ("by focusing on the deliberateness of the defendant's actions and his future dangerousness, the [Texas capital sentencing] questions compel the jury to make a *moral judgment* about the severity of the crime and the defendant's *culpability*") (Brennan, J., dissenting) (emphasis added).

Further, as the Court explained, any contrary understanding would necessarily overrule *Jurek* and "entail an alteration of the rule of *Lockett* and *Eddings.*" *Johnson,* 509 U.S. at 372. "Instead of requiring that a jury be able to

consider *in some manner* all of a defendant's relevant mitigating evidence, the rule would require that a jury be able to give effect to mitigating evidence *in every conceivable manner* in which the evidence might be relevant." *Id.* (emphasis added). This would constitutionally require the jury "be instructed in a manner that leaves it free to depart from the special issues in every case" and effectively deprive the states of the prerogative "to structure the consideration of mitigating evidence," *id.* at 373, overruling *Furman v. Georgia,* 408 U.S. 238 (1972), and *Gregg v. Georgia,* 428 U.S. 153 (1976), as well. The Court specifically rejected the converse "full effect" argument advanced by Justice O'Connor in dissent. *Id.* at 375-76, 379-87.

In 1999, when the state court decided Cole's *Penry I* claim, this Court had been silent on the *Penry I* issue for more than six years. Notably, however, the Court continued to endorse *Jurek* and *Johnson. See, e.g., Ayers v. Belmontes,* 127 S. Ct. 469, 480 (2006); *Tuilaepa v. California,* 512 U.S. 967, 972-75 (1994); *Buchanan,* 522 U.S. at 276-77. Thus, a state court ascertaining clearly-established federal law would have understood the following. Pursuant to *Jurek,* the former Texas special issues were facially constitutional. Yet *Lockett* and *Eddings* require that a jury not be prevented from making an individualized sentencing decision based on the available mitigating evidence. Although *Penry I* held that diminished capacity evidence of a defendant's inability to learn from his mistakes might have only aggravating relevance to future dangerousness and, thereby, lead to a violation of the Eighth Amendment rule of *Eddings,* the Texas special issues remained constitutionally sufficient so long as the defendant's evidence could find *some* mitigating relevance

to culpability within the special issues, regardless of whether it might have aggravating relevance as well. There existed a presumption of constitutionality under most circumstances, even where the defendant could characterize—and re-characterize as necessary throughout successive appeals—the mitigating evidence as beyond the effective reach of the jury. This is because a Texas jury was presumed to understand the consequences of its actions and the moral judgment required.

The net result was that few types of mitigating evidence would have only aggravating relevance within the special issues and lead to *Penry I* error.

B. *Penry II* did not alter the Court's *Jurek/Penry I/Johnson* jurisprudence, nor did it justify a change in perception among the lower courts.

In 2001, the Court revisited *Penry I* to decide whether a supplemental instruction given during Penry's retrial—an instruction not at issue here—"complied with [the Court's] mandate in *Penry I*." *Penry II*, 532 U.S. at 786. The Court first reiterated its holding in *Penry I*—that the mitigating evidence presented at Penry's 1980 trial was "relevant only as an *aggravating* factor" to the special issues—and explained that Penry was retried in 1990, where "the defense again put on extensive evidence regarding Penry's mental impairments and childhood abuse." *Id.* at 787-88. The Court then considered whether the Texas court had "unreasonably applied" *Penry I* by its endorsement of the supplemental instruction. *Id.* at 796-804.

The Court recognized "two possible ways" to interpret the supplemental instruction. First, the instruction "had no practical effect" because it merely told "the jurors to take Penry's mitigating evidence into account in determining their truthful answers to each special issue." *Penry II*, 532 U.S. at 798. Alternatively, it rendered the jury charge "internally contradictory" because the jury was also instructed that a "yes" answer to a special issue was appropriate only where supported by evidence proved beyond a reasonable doubt and a "no" answer was called for only when there was a reasonable doubt. *Id.* at 799. The supplemental instruction directed the jury to "change one or more truthful 'yes' answers to an untruthful 'no' answer in order to avoid a death sentence." *Id.* But "jurors who wanted to answer one of the special issues falsely to give effect to the mitigating evidence would have had to violate their oath to render a 'true verdict,'" creating "a reasonable likelihood that the jury applied the challenged instruction in a way that prevented the consideration of Penry's mental retardation and childhood abuse." *Id.*

Thus, neither of the two possible views of the supplemental instruction cured the error recognized in *Penry I*. The first left the jury in the same position as before, with no way to give effect to mitigating evidence that was only relevant to the special issues in an *aggravating* way. Conversely, the second advised the jury to render a false verdict because Penry's evidence was not relevant to the special issues in any *mitigating* way. However, both arguments rest on the same foundation: that Penry's evidence of mental retardation, brain damage, and severe child abuse was beyond the scope of the special issues. In essence, the supplemental instruction did not *create* new error; rather, the instruction simply *failed to correct* the

error identified in *Penry I* because, during Penry's retrial, the jury was again faced with mitigating evidence that compelled affirmative answers to the special issues and created a likelihood that the jury was unable to ethically assess a life sentence if it so chose.

Although the "full effect" language of Justice O'Connor's *Johnson* dissent surfaced in the *Penry II* majority opinion, 532 U.S. at 797, it had nothing to do with the supplemental-instruction issue because the *Penry I* Court had already reached the conclusion that Penry's mitigating evidence could not be given sufficient effect within the special issues. There is certainly no possibility a reasonable state court jurist would have assumed the *Penry II* majority turned the tables on the Court's prior opinion in *Johnson,* in which the Court specifically declined to adopt such a standard.

Although this Court approved of the "clearly drafted catchall instruction on mitigating evidence" that was adopted by Texas in 1991, it is important to note that the Court avoided holding any such instruction was *necessary. Penry II,* 532 U.S. at 803 (citing TEX. CODE CRIM. PROC. art. 37.071(2)(e)(1) (West 1991)); *Belmontes,* 127 S. Ct. at 480; *Blystone,* 494 U.S. at 305. Such a decision would have overruled *Jurek, Franklin, Graham,* and *Johnson,* which recognized that states are free to structure capital-sentencing schemes as they see fit, within certain reasonable parameters. *See Franklin,* 487 U.S. at 179 ("[W]e have never held that a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required"). The very idea that a specific instruction is *not* constitutionally necessary implies that most kinds of mitigating evidence do not

require special accommodation under *Penry I*. Cole's evidence is no different.

C. *Tennard, Smith*, and the new standard of constitutional relevance

In the wake of *Penry II*, the floodgates seemingly opened. After eight years of silence, the Court granted certiorari in six *Penry* cases in five years.[8] In *Tennard*, the Court confronted a *Penry I* claim based on an IQ score of sixty-seven. 542 U.S. at 277. In adjudicating the claim, the lower court applied its "constitutional relevance" test,[9] developed during the nine-year interim since *Graham* and *Johnson*. *Tennard*, 542 U.S. at 281, 283-84. But this Court reversed, holding that constitutional relevance was an "improper legal standard" with "no basis in [Supreme Court] precedents," and that the correct standard to be

---

[8] During this same time period, however, the Court *denied* certiorari in several *Penry* cases in which the evidence was not dissimilar to Cole's. *See, e.g., Newton v. Dretke*, 371 F.3d 250, 256-57 (5th Cir.) (mitigating evidence of difficult upbringing within the scope of the special issues), *cert. denied*, 543 U.S. 964 (2004); *Robertson v. Cockrell*, 325 F.3d 243, 245-46 (5th Cir.) (*en banc*) (childhood abuse at the hands of his alcoholic father as well as drug abuse), *cert. denied*, 539 U.S. 979 (2003); *Harris v. Cockrell*, 313 F.3d 238, 242 (5th Cir. 2002) (alcoholism), *cert. denied*, 540 U.S. 1218 (2004); *Hernandez v. Johnson*, 248 F.3d 344, 349 (5th Cir.) (treatable, chronic schizophrenia), *cert. denied*, 534 U.S. 1043 (2001). "[W]hile it is inappropriate to ascribe undue significance to denials of certiorari," this Court has certainly sent mixed signals to the court below in recent years. *See Robertson*, 325 F.3d at 256-57 & nn.21-24 (collecting cases in which certiorari was denied).

[9] "To be constitutionally relevant, the evidence must show (1) a uniquely severe permanent handicap with which the defendant was burdened through no fault of his own, . . . and (2) that the criminal act was attributable to this severe permanent condition." *Tennard v. Cockrell*, 284 F.3d 491, 595 (5th Cir. 2002) (internal quotations omitted).

applied was *only* whether the evidence was within the effective reach of the jury in answering the special issues. *Id.* at 287-88. Without actually determining that Tennard's low IQ was beyond the scope of the special issues, the Court merely remanded for further review. *Id.* at 288-89. The Court did not adopt or endorse the "full effect" language mentioned in *Penry II* and Justice O'Connor's *Johnson* dissent. Nor did the Court even mention *Jurek* or *Johnson,* much less overrule those precedents.

In essence, the *Tennard* Court chastised the Fifth Circuit for invoking "its own restrictive gloss on *Penry I*"—constitutional relevance—as a screening test. *Tennard,* 542 U.S. at 283. The Court explained that:

> [T]he "meaning of relevance is no different in the context of mitigating evidence introduced in a capital sentencing proceeding" than in any other context, and thus the general evidentiary standard—"any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"—applies.

Id. at 284 (quoting *McKoy v. North Carolina,* 494 U.S. 433, 440 (1990)). "Once this low threshold for relevance is met, the Eighth Amendment requires that the jury be able to consider and give effect to a capital defendant's mitigating evidence." *Id.* at 285 (quotations and citations omitted).

Although the Court noted that "gravity" has a place in the *Penry I* calculus "insofar as evidence of a trivial feature of the defendant's character or the circumstances of the crime is unlikely to have any tendency to mitigate the defendant's culpability," it is clear that most types of mitigating evidence will meet the *Tennard* relevance

standard. 542 U.S. at 286 (citation omitted). As noted *supra,* the lower court held that Cole's mitigating evidence—of a "turbulent family background" and "organic neurological deficiency"—satisfies the *Tennard* constitutional-relevance definition. JA:227-32.

The Court's opinion in *Smith v. Texas* the next term noted its ruling in *Tennard* but focused on an entirely different issue: a supplemental instruction similar to the one addressed in *Penry II.* As in *Penry II,* this instruction "did not provide the jury with an adequate vehicle for expressing a 'reasoned moral response' to all of the evidence relevant to the defendant's culpability." *Smith,* 543 U.S. at 45-48 (quoting *Penry II,* 532 U.S. at 796). Importantly, no *Penry II* instruction was submitted in the instant case. In this sense, *Smith* and *Penry II* are not directly on point.

In addition, the *Smith* Court reiterated its disapproval of the constitutional-relevance standard rejected in *Tennard. Smith,* 543 U.S. at 45. The state court in *Smith* had adopted that standard for the first time only two months prior to the issuance of *Tennard. Smith,* 543 U.S. at 43-45; *see also Ex parte Smith,* 132 S.W.3d 407, 413-14 (Tex. Crim. App. 2004) (citing *Robertson,* 325 F.3d at 251, and *Graham,* 950 F.2d at 1029). Of course, that standard was not employed by the court below. Beyond that, the *Smith* Court did not adjudicate the issue of whether Smith's evidence was beyond the effective reach of the jury in answering the former Texas special issues. Thus, *Smith* adds little to the *Jurek/Penry I/Johnson* story other than to reinforce the tangential opinions in *Penry II* and *Tennard.*

D. The current state of *Penry I* jurisprudence

When *Jurek*, *Penry I*, and the litany of cases that follow in the wake of those opinions are viewed as a whole, the following Eighth Amendment inquiry may be gleaned: a court must determine (1) whether the mitigating evidence has met the "low threshold for relevance" established in *Tennard* and, if so, (2) whether the evidence was within the effective reach of the jury in answering the special issues. 542 U.S. at 284-85; *Coble v. Dretke*, 444 F.3d 345, 358 (5th Cir. 2006); *Bigby v. Dretke*, 402 F.3d 551, 564-65 (5th Cir.), *cert. denied*, 126 S. Ct. 239 (2005); *Madden v. Collins*, 18 F.3d 304, 308 (5th Cir. 1994). "For the mitigating evidence to be within the effective reach of the jury in answering the special issues, the special interrogatories must be capable of giving relevant evidence constitutionally sufficient mitigating effect." *Brewer v. Dretke*, 442 F.3d 273, 278-79 (5th Cir.), *cert. granted*, 127 S. Ct. 433 (2006); *see also Tennard v. Dretke*, 442 F.3d 240, 257 (5th Cir. 2006) ("The key inquiry . . . is whether the jury could give sufficient *mitigating* effect to Tennard's evidence") (opinion on remand) (emphasis in original); *Bigby*, 402 F.3d at 564 (special issues must confer sufficient discretion on the sentencing body to consider the character and record of the individual offender); *Graham*, 506 U.S. at 468 (same). Of course, this objective inquiry is subject to the deferential standard of 28 U.S.C. § 2254(d)(1). *Tennard*, 542 U.S. at 288-89; *Coble*, 444 F.3d at 349-50; *Brewer*, 442 F.3d at 276-77; *Tennard*, 442 F.3d at 254.

As discussed above, this Court has recognized that, in most cases, the former special issues remain constitutional because they "allow consideration of particularized mitigating factors." *Jurek*, 428 U.S. at 272-73. The fact that mitigating evidence might have "*some* arguable relevance

beyond the special issues" is immaterial because "virtually *any* mitigating evidence is capable of being viewed as having some bearing on the defendant's 'moral culpability' apart from its relevance to the particular concerns embodied in the Texas special issues." *Graham,* 506 U.S. at 476 (citing *Franklin,* 487 U.S. at 190 (Stevens, J., dissenting)) (emphasis in *Graham*). To demonstrate Eighth Amendment error, there must exist more than "the mere possibility" that the jury was prevented from giving effect to mitigating evidence. *Johnson,* 509 U.S. at 367; *see also Brewer,* 442 F.3d at 281 (*Penry I* error results where "the only logical manner in which [the] jury could have considered the [mitigating] evidence [] under the future dangerousness special issue was as an aggravating factor"). Instead, Cole must show a reasonable likelihood the jury could not consider his mitigating evidence. *Boyde,* 494 U.S. at 380.

It is crucial to reiterate why the reasonable-likelihood standard exists: during repeated appeals brought by successive lawyers over the course of a decade or more, the trial record is embellished, exaggerated, and rehashed so much that what the jury listened to at trial bears no resemblance to the evidence described in a habeas corpus petition. Hyperbole is human nature. However, these subjective tendencies must be quelled in favor of an objective viewpoint if a jury verdict is ever to become final. Put another way, just because Cole can imagine a way the evidence might be relevant to his culpability outside the scope of the future-dangerousness special issue does not mean that a jury would deem that evidence to be beyond its grasp. This is mere speculation and is forbidden by *Boyde.* 494 U.S. at 380.

III. The Court Below Properly Rejected Cole's *Penry I* Claim.

When Cole's mitigating evidence is considered objectively, there is no *reasonable* likelihood the jury was precluded from giving constitutionally sufficient mitigating effect to it in answering the Texas future-dangerousness special issue. First, the lower court properly determined that Cole's evidence of childhood neglect was within the purview of future dangerousness because the expert testimony established he was "capable of change" and, thus, would not remain dangerous in the future. JA:243-44. As the court of appeals explained:

> [T]he Supreme Court itself has indicated that "family background" evidence falls within the broad scope of Texas's special issues. In *Graham*, the Court stated:
>
> > Moreover, we are not convinced that *Penry* [*I*] could be extended to cover the sorts of mitigating evidence Graham suggests without a wholesale abandonment of *Jurek* and perhaps also of *Franklin v. Lynaugh*. As we have noted, *Jurek* is reasonably read as holding that the circumstance of youth is given constitutionally adequate consideration in deciding the special issues. *We see no reason to regard the circumstances of Graham's family background and positive character traits in a different light.* Graham's evidence of transient upbringing and otherwise nonviolent character more closely resembles Jurek's evidence of age, employment history, and familial ties than it does Penry's evidence of

> mental retardation and harsh physical abuse.

JA:243 (quoting *Graham,* 506 U.S. at 476) (emphasis in *Cole*).

Cole counters that "*Graham* did not involve evidence of a *troubled* family background, marked by mistreatment, abandonment, and neglect." Brief at 36 (emphasis in original). Yet the four dissenting justices clearly believed it did, but employed the phrase "difficult upbringing" instead. *Graham,* 506 U.S. at 520 (Souter, J., dissenting). The two concepts are undoubtedly synonymous. Indeed, the Fifth Circuit had previously described it as a "difficult childhood." *Graham v. Collins,* 950 F.2d 1009, 1013 (5th Cir. 1992) (*en banc*) (quoting *Graham v. Collins,* 896 F.2d 893, 897 (5th Cir. 1990)). And the *Graham* dissenters made clear just what they thought was "difficult" about Graham's childhood: "his mother's mental illness and repeated hospitalization, and his shifting custody to one family relation or another." *Graham,* 506 U.S. at 520.

Cole's childhood involved an alcoholic mother who relinquished her custody to a children's home for nearly five years. JA:36-37, 56. After Cole returned home to live with his mother, by then sober and remarried, Cole experienced a reasonably idyllic childhood from the age of ten until sixteen. *Id.* at 39-40. During this time, Cole excelled in school, and his success was no doubt due to his high intelligence and stable home life. *Id.* at 41-43, 63. At the age of sixteen, however, Cole murdered his best friend and thereafter spent most of his life in prison for various assaultive offenses. 17 RR 697-99, 708-09; 18 RR 49-63. There is no meaningful distinction between Cole's evidence of a troubled upbringing followed by a lengthy criminal

history and Graham's evidence of a violent crime spree preceded by a difficult childhood. It certainly does not compare to the frequent child abuse and emotional deprivation experienced by Penry. *See Penry I,* 492 U.S. at 308-10 (expert testimony concerning "beatings and multiple injuries to the brain at an early age," as well as social and emotion deprivation; sibling's testimony that "mother had frequently beaten him over the head with a belt when he was a child," and "routinely locked [him] in his room without access to a toilet for long periods of time").

The lower court has rejected Eighth Amendment claims based on very similar evidence of a troubled childhood:

> This [C]ourt . . . has also held that evidence of a defendant's "unstable" and "transient" childhood could be given effect under the special issues. *Jacobs v. Scott,* 31 F.3d 1319, 1327 (5th Cir. 1994) (citing *Graham v. Collins,* 506 U.S. 461 []). In *Jacobs,* we distinguished evidence of a troubled childhood offered by the defendant from that in *Penry I. Id.* Jacobs argued that:
>
> > evidence was presented showing that Mr. Jacobs had an unstable, troubled childhood. He never knew his mother, and has only vague memories of his father. His father left him to live alone with strangers when he was a small boy, and Mr. Jacobs never saw him again. Mr. Jacobs ended up living in several foster homes as a child, separated from his sister, parents, and all other family connections.
>
> *Id.* Coble had a troubled childhood similar to that of Jacobs and Graham, "as opposed to a childhood

> rife with harsh physical abuse like that of Penry." *Id.* Coble's evidence of his troubled childhood included: (1) the death of his father before he was born; (2) poverty in childhood; (3) his stepfather's alcoholism and conflicts with his mother; and (4) his mother's nervous breakdown. His evidence of his childhood is more "transient" and "unstable," like the evidence presented in *Jacobs* and *Graham* than it is similar to Penry's evidence of abuse. Coble's evidence is distinguishable from that in *Penry.*

Coble, 444 F.3d at 362.

As in *Coble, Jacobs,* and *Graham,* Cole's childhood troubles—a neglectful mother and largely absent father—were well within the reach of the jury in answering the future-dangerousness special issue. Indeed, it is very likely that the vast majority of death-eligible criminals had similar, negative childhood experiences. But the overwhelming number of such inmates who were tried prior to 1991 in Texas are not entitled to *Penry I* relief. If this were the case, *Penry I* would cease to be the exception to *Jurek.* Instead, *Jurek* would be the exception to *Penry I.* Thus, it is important to recognize the *exceptional* nature of the mitigating evidence in *Penry I.* 492 U.S. at 308-10. Cole's evidence of childhood neglect is clearly not so exceptional; rather, it is just a typical death penalty case and Cole is not entitled to a retrial after nearly twenty years.

The court below also correctly rejected Cole's *Penry I* claim based on a possible neurological dysfunction. JA:239. As the court of appeals reasoned, "the testimony proffered by two of Cole's own expert witnesses is *directly contrary* to the testimony at Penry's penalty phase that

the *Penry* [*I*] Court found aggravating." *Id.* at 239. For example, Dr. Wright testified Cole would "begin to make changes at about forty, forty-five, fifty, somewhere in there. They tend to mellow a bit and change a good bit." *Id.* at 68, 240. Dr. Wright added, "the evidence is overwhelming there that individuals who have behaved as [Cole] has change. They burn out."[10] *Id.* at 74, 240. "Dr. Wright also testified that even though Cole's diary demonstrated a 'fantasy' to behave like a 'modern-day Viking' or a 'pirate,' Cole was unlikely to act on such fantasies because he did not have the 'wherewithal' to do so." *Id.* at 241 (quoting *id.* at 72). Dr. Wright added that Cole developed these fantasies simply as a way to deal with the monotony of prison life. *Id.* at 71-72. Dr. Dickerson confirmed that violent conduct diminishes with age and becomes "fairly rare" by the time individuals reach the age of forty. *Id.* at 95, 241.

Thus,

> Unlike the evidence in *Penry,* Cole's mitigating evidence did not suggest that he was unable to learn from his mistakes. The record does not suggest that the jury viewed Cole's mitigating evidence as an aggravating factor only, *i.e.,* because he cannot learn from his mistakes, he will remain a danger in the future. Rather, the evidence proffered by Cole's expert witnesses suggested to the jury that Cole could change in the future.

---

[10] Cole erroneously criticizes this testimony as "generic" and equally applicable to "*any* offender." Brief at 31 (emphasis in original). Not only does this statement ignore the explicit opinion of Dr. Wright, it disregards the very characteristic that rendered Penry's mitigating evidence *aggravating* within the future-dangerousness special issue: that his condition would never improve. *Penry I,* 492 U.S. at 323-24.

* * *

> That this evidence fits well within the broad scope of the future-dangerousness special issue is clearly evident from the testimony of Cole's own expert witnesses.

JA:242-43. This "burn out" theory was stressed by defense counsel during closing argument and possessed significant power in Cole's case: he was nearly thirty-two years old at the time of trial. *Id.* at 82, 141-42. Additionally, the jury was told that Cole was happiest in the disciplined structure of prison, to which he had grown accustomed during two lengthy incarcerations. *Id.* at 74-75, 142-43.

The lower court recently held that evidence of a borderline personality disorder was not within the jury's reach in answering the future-dangerousness issue where conflicting expert testimony indicated that successful treatment was unlikely. *Nelson v. Quarterman,* ___ F.3d ___, 2006 WL 3592953, *20 (5th Cir. Dec. 11, 2006) (*en banc*). The court reasoned that

> a juror considering Nelson's evidence of borderline personality disorder would have felt that he could give the evidence only one possible effect via the future-dangerousness issue: Such a juror would have seen the evidence as *only aggravating,* because Nelson's borderline personality disorder and the difficulty of treating it increase the likelihood that Nelson will act out violently again.

Id. at *21 (emphasis added). While the court of appeals questioned prior circuit authority[11] concerning treatable

---

[11] *See Lucas v. Johnson,* 132 F.3d 1069, 1082-83 (5th Cir. 1998) (finding evidence that a defendant was psychotic and schizophrenic, but

(Continued on following page)

mental illness, *id.* at *25, it is clear that the *Nelson* court based its holding on the record and the notion that *Penry I* error occurs only where the mitigating evidence has only *aggravating* relevance to the special issues.[12]

In Cole's case, however, there was no conflicting expert testimony concerning whether his potential neurological dysfunction was treatable or would diminish with time. In fact, Dr. Wright could not state with certainty that any such dysfunction existed. JA:77-78. No expert actually diagnosed Cole with any mental disease or disorder. Nor did the experts opine that Cole could not distinguish the difference between right and wrong or appreciate the consequences of his actions. *Id.* at 86; *see also* 15 RR 260-61, 270-74 (describing Cole's willingness to confess to instant crime); 17 RR 740 (Cole's voluntary confession to earlier child rapes). Further, as noted *supra,* the jury heard expert testimony that Cole would "burn out" in less than ten years. JA:68, 74, 95, 141-42. Therefore, Cole's putative neurological problem could not have had *aggravating* relevance within the special issues, and any contrary argument amounts to nothing more than pure speculation. Similarly, Cole's supposition that he might "be unable to stop himself" from "making the same 'mistake' again" is not supported by the evidence or common experience. Brief at 29, 33. *Boyde* makes it clear that

---

that his mental problems had responded to antipsychotic drugs and was treatable, could be considered under the future-dangerousness special issue).

[12] Two judges who joined the *Nelson* majority were panel members in *Cole*, but reached the opposite conclusion in the instant case. *Cf.* JA:219. Moreover, the *en banc* Fifth Circuit's prior denial of rehearing in this case implies that the *Nelson* majority does not view Cole's *Penry I* claim as equivalent to Nelson's. *Cole,* 443 F.3d at 442.

Eighth Amendment error may not be premised on such conjecture. 494 U.S. at 380.

Other Fifth Circuit opinions confirm this reasoning. *See Coble,* 444 F.3d at 361-62 (holding treatable bipolar and posttraumatic stress disorders within scope of future-dangerousness issue); *Hernandez,* 248 F.3d at 349 (holding "evidence of chronic schizophrenia could be considered by the jury in answering the question of future dangerousness," because "[w]ith medication and treatment, remission can be sustained"); *Robison v. Johnson,* 151 F.3d 256, 265-67 (5th Cir. 1998) (holding that evidence of petitioner's schizophrenia, including testimony that it was treatable and could go into remission, could be given mitigating effect under the future-dangerousness special issue); *Demouchette v. Collins,* 972 F.2d 651, 653 (5th Cir. 1992) (holding that a jury was able to consider the mitigating effect of evidence of personality disorder under first special issue where major thrust of evidence was that the disorder caused defendant to act impulsively rather than deliberately); *but see Tennard,* 442 F.3d at 256 (finding *Penry I* violation where evidence showed low IQ, a "static trait" or "permanent physiological feature"); *Bigby,* 402 F.3d at 571 (paranoid schizophrenia not amenable to treatment or control not within scope of future dangerousness). A treatable mental problem is distinctly different from a chronic mental illness, like Penry's, that prevents a defendant from ever learning from his or her mistakes. The *Nelson* majority did not overrule these opinions and, indeed, did not even mention them.

Cole argues, Brief at 25-30, that the lower court's decision runs afoul of *Smith* and *Tennard* by attempting to revive the "permanence" element of the former constitutional relevance test. But temporary conditions are fundamentally

distinct from long-term, chronic characteristics and are less likely to mitigate culpability. If this were not the case, then mere intoxication at the time of the offense would be as mitigating as severe mental retardation. This is clearly not so. *See, e.g., Harris,* 313 F.3d at 242 (intoxication within the scope of the special issues for *Penry I* purposes); *James v. Collins,* 987 F.2d 1116, 1121 (5th Cir. 1993) (same). In fact, this Court noted that "gravity" has a place in the *Penry I* calculus "insofar as evidence of a trivial feature of the defendant's character or the circumstances of the crime is unlikely to have any tendency to mitigate the defendant's culpability." 542 U.S. at 286 (citation omitted). "Gravity" is a synonym for severity, seriousness, or importance. THE AMERICAN HERITAGE COLLEGE DICTIONARY 595 (3d ed. 2000). "Trivial" means insignificant or inessential. *Id.* at 1447. Transient or impermanent characteristics are certainly, on average, less serious or significant and are less likely to mitigate culpability. To deny this fact, as Cole does, is to deny commonsense. Either concept certainly bears on whether the likelihood of *Penry I* error is *reasonable.* Any other interpretation would lead to a *per se*-error analysis and overrule *Jurek, Graham,* and *Johnson.*

Moreover, *Tennard* and *Smith* do not support Cole's argument, because the opinions deal only with the application of permanence as a "screening test" which might foreclose reaching "the heart of [a petitioner]'s *Penry* [*I*] claims." *Tennard,* 542 U.S. at 282-86. Here, the court of appeals *did* reach the heart of Cole's *Penry I* claim and discussed each category of the evidence at length. In fact, Cole reads far too much into *Tennard* and *Smith* when he suggests that they dispense with any comparative analysis of the mitigating evidence. Reasonableness can hardly be

judged in the absence of such comparisons. This is especially true where the relative permanence of a mitigating circumstance bears *directly* on the probability of future dangerousness.

And unlike *Tennard,* the prosecutor did not ask the jury to consider Cole's mitigating evidence as aggravating. The prosecuting attorney certainly argued the State had carried its burden of proof concerning Cole's probable future dangerousness.[13] JA:140, 147-48. But the prosecutor based this argument on the *aggravating* evidence presented by the State—including Cole's prior murder and sexual assault convictions—and not Cole's mitigating evidence. *Id.* at 137-38. Importantly, however, the prosecutor did not "press[ ] exactly the most problematic interpretation of the special issues, suggesting that [Cole's mitigating evidence] was irrelevant in mitigation, but relevant to the question whether he posed a future danger."[14] JA:245 (quoting *Tennard,* 542 U.S. at 289).

Cole further suggests that "[n]either party at [his] trial made any argument that [his] abused childhood logically warranted a 'no' answer to the 'future dangerousness'

---

[13] Cole asserts that the State's argument violates *Penry I.* Brief at 23. This argument is specious because the State was merely arguing it met its burden of proof. The State will make just such an argument *in every case.* But not every death penalty case results in *Penry I* error.

[14] Cole also argues that the State's voir dire invited the jurors to ignore the mitigating evidence in answering the special issues. Brief at 19-21. But, as this Court reasoned in *Penry II,* it is doubtful that "jurors would have remembered the explanations given during voir dire, much less taken them as a binding statement of the law." 532 U.S. at 801. In Cole's case, voir dire began more than two weeks before the sentencing phase of trial. Thus, "[t]he comments of the court and counsel during voir dire were surely a distant and convoluted memory by the time the jurors began their deliberations on [Cole]'s sentence." *Id.* at 802.

question." Brief at 23-24, 36-37. But Cole is wrong. Defense counsel urged the jury to answer negatively because Cole would "burn out" and cease to be dangerous. JA:141-42. Counsel further suggested that Cole would prosper and benefit from the structured, disciplined environment of prison: "[t]he only peace he ever finds is in the penitentiary . . . that's the only life he's ever known." *Id.* at 142-43. Moreover, counsel clearly argued to the jury that there was no probability—beyond a reasonable doubt—that Cole would commit future acts of violence if sentenced to life imprisonment. This is certainly not a plea for "nullification" in spite of the evidence, as Cole claims. Brief at 24 n.12.

IV. The State Court Reasonably Rejected Cole's *Penry I* Claim.

On state postconviction review, the Court of Criminal Appeals carefully considered Cole's *Penry I* claim and reasonably applied the appropriate Supreme Court precedent. JA:157-61 (citing *Penry I* and *Graham*). The court first set forth a detailed description of *all* of the mitigating evidence before the jury. *Id.* at 157-59. The court then correctly explained that, in addressing a *Penry I* claim, "[t]he issue is whether the sentencing jury had been unable to give effect to [Cole]'s mitigation evidence within the confines of the statutory 'special issues.'" *Id.* at 159. This issue "must be determined on a case by case basis, depending on the nature of the mitigating evidence offered and whether there exists other testimony in the record that would allow consideration to be given." *Id.* at 160. Because of the expert opinions provided by Drs. Wright and Dickerson, the state court explained, there was "a basis for the jury to have given consideration to the type of

mitigating testimony offered by [Cole]." *Id.* (quoting *id.* at 68, 74, 77-79, 102).

Cole criticizes the state court's reasoning as cursory and ill-founded. Brief at 40-44. However, as explained above, the state court's reasoning is inapposite under the AEDPA. It is only the court's ultimate decision that is to be reviewed. *Saiz,* 392 F.3d at 1176; *Wright,* 278 F.3d at 1255; *Santellan,* 271 F.3d at 193; *Cruz,* 255 F.3d at 86; *Matteo,* 171 F.3d at 891. The state court's decision—that there was no reasonable likelihood Cole's mitigating evidence was outside the jury's effective reach in answering the special issues—is without question a reasonable application of *Jurek* and *Penry I.* The state court did not fail to examine the trial record or screen out any of Cole's mitigating evidence. Although Cole argues that "it is impossible here to identify what aspects of Mr. Cole's mitigating evidence the [state court] viewed as irrelevant to the jury's sentencing decision," Brief at 42, it is clear that the state court viewed *all* of Cole's evidence as relevant. Otherwise the court would not have thoroughly described that evidence. JA:157-59. Nor did the state court employ a "severity" or "nexus" analysis, as Cole implies. Brief at 42. Those terms do not appear in the court's findings, and its insistence on a case-specific assessment of "the nature of the mitigating evidence offered" and the context of the trial is exactly what *Penry I* requires. *Id.* at 160-61; *see Brown v. Payton,* 544 U.S. 133, 144 (2004) (explaining that the whole context of the trial must be considered in a *Penry I* analysis) (citing *Boyde,* 494 U.S. at 383).

In any event, if the state court's decision was even arguably unreasonable, the lower court was entirely within its authority to consider and reject Cole's claim *de*

novo. Although Cole suggests otherwise, Brief at 26, habeas corpus relief is precluded except where a person is "in custody pursuant to the judgment of a State court . . . in violation of the Constitution." 28 U.S.C. § 2254(a). The fact that a state court may have conducted an unreasonable analysis of a federal constitutional claim does not entitle Cole to relief. It only means that a federal habeas court may avoid the deferential standard owed to reasonable state court judgments under § 2254(d) and review a petitioner's claim *de novo.*

Finally, overriding the state court's denial of Cole's *Penry I* claim at his point would violate the recognized policy interests of comity and finality. The finality of that 1999 judgment and the respect owed to it as a matter of federalism would be upset if the Court invalidated Cole's death sentence based on precedent that did not exist at the time. The *Teague* question is usually framed as "'whether a state court considering [the defendant's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution.'" *Goeke v. Branch,* 514 U.S. 115, 118 (1995) (quoting *Caspari v. Bohlen,* 510 U.S. 383, 390 (1994) (internal quotations omitted)). Here, the state court would have been compelled by *Johnson* and *Graham* to reject Cole's *Penry I* claim in 1999.

Any other holding would unfairly trample the "reasonable, good-faith interpretations" of these precedents that the state court relied upon in adjudicating Cole's *Penry I* claim. *Graham,* 506 U.S. at 467 (quoting *Butler v. McKellar,* 494 U.S. 407, 414 (1990)). Indeed, "reasonable jurists in [1999] would have found that, under [the Court's] cases, the Texas statute satisfied the commands of

the Eighth Amendment" with regard to Cole's mitigating evidence. *Id.* at 472.

> The interests of the State of Texas, and of the victims whose rights it must vindicate, ought not to be turned aside when the State relies upon an interpretation of the Eighth Amendment approved by this Court, absent demonstration that our earlier cases were themselves a misinterpretation of some constitutional command.

Johnson, 509 U.S. at 366-67. Thus, to the extent the relief Cole requests requires a new rule, both the AEDPA and the non-retroactivity doctrine of *Teague* bar relief.

CONCLUSION

For the foregoing reasons, the decision of the Fifth Circuit should be affirmed in all respects.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

KENT C. SULLIVAN
First Assistant Attorney General

ERIC J.R. NICHOLS
Deputy Attorney General
for Criminal Justice

GENA BUNN
Chief, Postconviction
Litigation Division

*EDWARD L. MARSHALL
Deputy Chief, Postconviction
Litigation Division

P. O. Box 12548, Capitol Station
Austin, Texas 78711
Tel: (512) 936-1400
Fax: (512) 320-8132
Email: elm@oag.state.tx.us

ATTORNEYS FOR RESPONDENT

**Counsel of Record*

(11)

No. 05-11284

FILED
JAN 9 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

JALIL ABDUL-KABIR, formerly known as
TED CALVIN COLE,

Petitioner,

v.

NATHANIEL QUARTERMAN,
Director, Texas Department of Criminal Justice,
Correctional Institutions Division,

Respondent.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Fifth Circuit**

REPLY BRIEF FOR PETITIONER

ROBERT C. OWEN
CAPITAL PUNISHMENT CENTER
UNIVERSITY OF TEXAS
SCHOOL OF LAW
727 East Dean Keeton
Austin, TX 78705
(512) 232-9391
*Counsel of Record
for Petitioner*

RAOUL D. SCHONEMANN
3774 Harrison Street
Oakland, CA 94611
(510) 654-1192

JORDAN M. STEIKER
CAPITAL PUNISHMENT CENTER
UNIVERSITY OF TEXAS
SCHOOL OF LAW
727 East Dean Keeton
Austin, TX 78705
(512) 232-1346

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

A. Respondent declines to defend the rationale of the state courts' decision denying relief under *Penry v. Lynaugh*, 492 U.S. 302 (1989), but fails to explain how jurors could have concluded that the relevant mitigating qualities of Mr. Cole's childhood neglect and deprivation, resulting mental and emotional disorders as an adult, neurological dysfunction, and diminished impulse control supported a "no" answer to the future dangerousness issue 1

B. Respondent's assertions about Mr. Cole's childhood of neglect and deprivation unreasonably minimize the testimony of Mr. Cole's lay witnesses and ignore the powerful testimony of his experts 3

C. Mr. Cole's evidence of neurological dysfunction was detailed and persuasive – indeed, it was far more substantial than the I.Q. score evidence ultimately found to require relief under *Penry* in *Tennard* 5

D. Mr. Cole's experts did not dispute that, as a result of his destructive childhood experiences, Mr. Cole was presently dangerous and would likely remain dangerous for "years" to come 7

CONCLUSION 11

TABLE OF AUTHORITIES

Page

CASES

Boyde v. California, 494 U.S. 370 (1990) 3

Brewer v. Quarterman, 2006 WL 3787960 (5th Cir. Dec. 27, 2006) 12

Bronshtein v. Horn, 404 F.3d 700 (3rd Cir. 2005) 2, 3

Cole v. Dretke, 99 Fed. Appx. 523 (5th Cir. 2004) 10

Early v. Packer, 537 U.S. 3 (2002) 3

Eddings v. Oklahoma, 455 U.S. 104 (1982) 5

Huss v. Graves, 252 F.3d 952 (8th Cir. 2001) 2

Long v. Humphrey, 184 F.3d 758 (8th Cir. 1999) 2

Matteo v. Superintendent, 171 F.3d 877 (3rd Cir. 1999) 2

Mines v. State, 888 S.W.2d 816 (Tex. Crim. App. 1994) 1

Nelson v. Quarterman, ___ F.3d ___, 2006 WL 3592953 (5th Cir. Dec. 11, 2006) (*en banc*) 11, 12

Penry v. Johnson, 532 U.S. 782 (2001) 8

Penry v. Lynaugh, 492 U.S. 302 (1989) ..... *passim*

Saiz v. Ortiz, 392 F.3d 1166 (10th Cir. 2004) 2

Stevens v. Ortiz, 465 F.3d 1229 (10th Cir. 2006) 2

Tennard v. Dretke, 542 U.S. 274 (2004) ..... *passim*

Williams v. Taylor, 529 U.S. 362 (2000) 3

Wright v. Dept. of Corrections, 278 F.3d 1245 (11th Cir. 2002) 2

TABLE OF AUTHORITIES – Continued

Page

STATUTES

28 U.S.C. § 2254(d) 1, 2, 3

MISCELLANEOUS

Brief of *Amici Curiae* Child Welfare League of America, *et al.*, *Abdul-Kabir v. Quarterman*, No. 05-11284, and *Brewer v. Quarterman*, No. 05-11287 (O.T. 2005) 5

Brief of Respondent, *Tennard v. Dretke*, No. 02-10038 (O.T. 2002) 2

Joint Appendix, *Tennard v. Dretke*, No. 02-10038 (O.T. 2002) 7

Transcript of Oral Argument, *Tennard v. Dretke*, No. 02-10038 (O.T. 2002) 6

A. Respondent declines to defend the rationale of the state courts' decision denying relief under *Penry v. Lynaugh*, 492 U.S. 302 (1989), but fails to explain how jurors could have concluded that the relevant mitigating qualities of Mr. Cole's childhood neglect and deprivation, resulting mental and emotional disorders as an adult, neurological dysfunction, and diminished impulse control supported a "no" answer to the future dangerousness issue.

In his opening brief, Mr. Cole[1] explained in detail why the rejection of his *Penry* claim by the Texas Court of Criminal Appeals ("CCA"), entangled as it was with longstanding Texas caselaw enforcing the "nexus" and "severity" conditions later struck down by this Court in *Tennard v. Dretke,* 542 U.S. 274 (2004), was objectively unreasonable in light of then-existing clearly established Federal law, such that this Court should intervene and correct it under 28 U.S.C. § 2254(d). *See* Brief for Petitioner ("PB") 39-49. Respondent denies that the state courts applied any such "nexus" and "severity" tests. *See* Brief of Respondent ("RB") 41 (asserting that the "terms [nexus and severity] do not appear in the [state] court's findings").[2] Further, Respondent states that he need not

---

[1] All relevant court documents and records in this case refer to Petitioner Jalil Abdul-Kabir by his former name, Ted Calvin Cole. With Mr. Abdul-Kabir's permission, this brief will call him "Mr. Cole."

[2] Respondent is understandably reluctant to acknowledge the actual basis of the state courts' decision. As we have demonstrated, *see* PB 40-42 and accompanying notes, the cases cited by the state courts in rejecting Mr. Cole's *Penry* claim apply precisely the "nexus" and "severity" limitations this Court forcefully rejected in *Tennard*. Indeed, one of the cases cited in *Cole – Mines v. State*, 888 S.W.2d 816 (Tex. Crim. App. 1994) – is among those *Respondent* has previously cited to this Court to show how the CCA routinely foreclosed *Penry* claims on

(Continued on following page)

defend the CCA's reasoning to prevail under § 2254(d) in any event, because only the state court's "ultimate decision" need be "tested for unreasonableness"; its "reasoning is inapposite." *Id.*[3] Thus, at the same time that Respondent

---

nexus and severity grounds. *See* Brief of Respondent, *Tennard v. Dretke*, No. 02-10038 (O.T. 2002) at 28-29 (citing *Mines* as illustrating the CCA's rule that "Mitigating evidence that fails to meet these criteria [*i.e.*, that does not show "an involuntary, permanent, and severe disability that was directly connected to the crime," *id.*] is not relevant to moral culpability. . . .").

[3] Respondent cites several cases for its claim that a state court's reasoning is irrelevant under § 2254(d), *see* RB 14, but most of them do not support it. For example, *Saiz v. Ortiz*, 392 F.3d 1166, 1176 (10th Cir. 2004), notes that the Tenth Circuit has not followed the practice of looking solely to the state court's result "where the state court's explicit reasoning contravenes Supreme Court precedent." *Saiz*, 392 F.3d at 1176 (citation omitted); *see also, e.g., Stevens v. Ortiz*, 465 F.3d 1229, 1235 (10th Cir. 2006) ("When we review a summary disposition by a state court, we focus on its result rather than any reasoning," citing *Saiz*; "[h]owever, when applying AEDPA to fully reasoned opinions . . . , this circuit has not focused solely on the result 'where the state court's explicit reasoning contravenes Supreme Court precedent' "). Similarly, *Wright v. Dept. of Corrections*, 278 F.3d 1245, 1255 (11th Cir. 2002), acknowledges that the Eleventh Circuit had previously held that a federal habeas court should consider whether a state court had "explicitly misapplied" controlling law, because a state court's "failure . . . to set out its reasoning is not equivalent to the conspicuous misapplication of Supreme Court precedent." *Id.* at 1256 n.3 (citation omitted). *Long v. Humphrey*, 184 F.3d 758, 760-61 (8th Cir. 1999), specifically identifies the reasons the state court gave for its challenged action in that case, *see id.* at 761, and in this regard is consistent with subsequent Eighth Circuit cases considering the state court's reasoning as part of the § 2254(d) analysis. *See, e.g., Huss v. Graves*, 252 F.3d 952, 955-56 (8th Cir. 2001) (finding that the state court decision was unreasonable because it "applied the incorrect legal standard to [the petitioner's] case," by relying on particular language in one Supreme Court opinion "to the exclusion of other relevant considerations"). Similarly, Respondent's citation to *Matteo v. Superintendent*, 171 F.3d 877, 891 (3rd Cir. 1999), for this proposition is undermined by later Third Circuit cases assessing a state court's reasoning as part of the § 2254(d) analysis. *See, e.g., Bronshtein v. Horn*, 404 F.3d 700, 723-24

(Continued on following page)

pointedly refuses to defend the ground on which the CCA actually *did* reject Mr. Cole's *Penry* claim (*i.e.*, by citing to cases suggesting that Mr. Cole's evidence was insufficiently "severe" and lacked a "nexus" to the crime), he also refuses to engage Mr. Cole's argument that his jurors would not reasonably have understood his mitigating evidence to support a "no" answer to the future dangerousness question. Respondent's argument for upholding the Fifth Circuit's judgment endorsing Mr. Cole's death sentence, then, reduces to his weak attacks on Mr. Cole's evidence and the other circumstances we have identified as relevant to the Court's inquiry under *Boyde v. California*, 494 U.S. 370 (1990). It is to those matters that we now turn.

B. Respondent's assertions about Mr. Cole's childhood of neglect and deprivation unreasonably minimize the testimony of Mr. Cole's lay witnesses and ignore the powerful testimony of his experts.

Respondent contends that the Fifth Circuit was correct in holding that Mr. Cole's mitigating evidence of childhood

---

(3rd Cir. 2005) (finding state court to have unreasonably applied *Batson*, based on the state court's reasoning "that the record suggested legitimate reasons that could have motivated the prosecutor to exercise the contested peremptory challenge"). These opinions make plain that no such consensus exists among the Circuits that a federal habeas court must ignore the state court's *ratio decidendi*. Any such approach, moreover, would appear to be out of step with this Court's observation that a federal court applying § 2254(d) must decide that neither "*the reasoning nor the result* of the state-court decision contradicts" Supreme Court precedent. *Early v. Packer*, 537 U.S. 3, 7-8 (2002) (*per curiam*) (emphasis added); *see also, e.g.*, *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000) (examining the Virginia Supreme Court's reasoning, and not simply the result it reached, on the way to determining that the state court's rejection of Williams' ineffective-assistance claim was objectively unreasonable).

neglect and deprivation was "well within the reach of the jury in answering the future-dangerousness special issue." RB at 33. In so arguing, Respondent strains to diminish the force of Mr. Cole's evidence by focusing exclusively on the lay witnesses' testimony to the exclusion of defense expert testimony, and characterizing the proof as showing only "a neglectful mother and largely absent father." *Id.*

Even the lay testimony showed that Mr. Cole's mother was not just "neglectful," as Respondent mildly puts it. In fact, she was an *alcoholic* who drank so much that she was unable properly to care for her children, and his father not simply "absent" but a criminal who was arrested for robbing a liquor store shortly after Mr. Cole was born and who abandoned the family before he was five. JA 35-36. Mr. Cole's mother turned Mr. Cole over to her parents, *also* alcoholics, who were similarly unable or unwilling to care for him. *Id.* Mr. Cole was then placed in a children's home, where in five years his mother visited him only twice and his father not at all. *Id.* at 37-38, 57. During these years of exile from his family, Mr. Cole was emotionally withdrawn and unexpressive. *Id.* at 57.

But more significant than Respondent's quibbles with the lay mitigation testimony is his failure to confront Mr. Cole's *expert* testimony on the subject of Mr. Cole's upbringing, which told jurors directly and emphatically that Mr. Cole had endured a "very rugged, rough childhood." JA 67; *see also* JA 68 (Mr. Cole showed marks of having experienced "a bad, very painful background"). Jurors heard that Mr. Cole had "never felt loved and worthwhile in his life," so much so that he exhibited "terrific needs for nurturance," a "fragmented personality" and "chronic depression." JA 67, 86; *see also* JA 73 (the cumulative impact of Mr. Cole's life experience left his personality

"very damaged" and "horribly" distorted).[4] Reasonable jurors, hearing both the lay witnesses' descriptions of Mr. Cole's childhood and Dr. Wright's testimony about the degree to which Mr. Cole was emotionally and psychologically impaired as a result, would hardly have shared Respondent's dismissive view of the strength of that evidence.

C. Mr. Cole's evidence of neurological dysfunction was detailed and persuasive – indeed, it was far more substantial than the I.Q. score evidence ultimately found to require relief under *Penry* in *Tennard*.

Respondent continues to misrepresent the record with respect to Mr. Cole's neurological impairment. Respondent denigrates the evidence as showing only "a possible neurological dysfunction," RB 33, although admitting in a footnote that the district court's similar characterization of the evidence as "entirely insufficient to prove" such a disorder was rejected by the Fifth Circuit. RB 8 n.5.[5] In

---

[4] Dr. Wright's testimony about Mr. Cole's impairment is consistent with *amici*'s observation that "children who are subjected to grave neglect" often suffer "emotional and developmental harm," as well as being "at increased risk for substantial mental illness." *See* Brief of *Amici Curiae* Child Welfare League of America, *et al.*, at 20-21 and accompanying notes.

[5] Respondent also argues that Mr. Cole's neurological dysfunction did not prevent him from "distinguish[ing] the difference between right and wrong," RB 36. That observation is surely irrelevant; *Penry*, too, involved a defendant whom a jury found capable of telling right from wrong, *see Penry*, 492 U.S. at 310, and in any event this Court long ago made clear that a defendant's mental impairment need not rise to the level of insanity in order to be constitutionally entitled to consideration as a mitigating factor. *Eddings v. Oklahoma*, 455 U.S. 104, 113 (1982).

fact, Mr. Cole's jury heard a qualified expert, Dr. Wright, testify that he had personally administered a battery of scientifically validated and generally accepted neuropsychological tests to Mr. Cole. They further heard Dr. Wright testify that he concluded that Mr. Cole's poor performance on those tests – scoring in the bottom five percent of the population on some – indicated that Mr. Cole suffered from central nervous system damage that impairs his impulse control. *See* JA 62-66, 70, 75-78. At oral argument in *Tennard*, when Respondent complained that the defense witness who offered Tennard's I.Q. score "had no idea who had given the test, [or] what kind of test was given, [or] when it was given," it was pointed out to Respondent that the State had every opportunity to challenge that evidence at trial, but did not do so. *See* Transcript of Oral Argument, *Tennard v. Dretke*, No. 02-10038, at 37-38. Precisely the same is true here. But just as in *Tennard*, Respondent now wants to dispute test results that were essentially uncontested at trial.

Dr. Wright's testimony about Mr. Cole's dismal test performance is precisely the type of scientific evidence that is routinely presented to demonstrate that an individual suffers from neurological or neuropsychological impairment; at the time of trial it was essentially the *only* type of testing available, short of post-mortem examination via autopsy, to indicate the presence of such dysfunction. *See* JA 78. Respondent's resistance to this evidence just reflects his categorical approach to *Penry*: because neurological impairment isn't mental retardation, it can't form the basis for relief. That argument does not survive *Tennard*; moreover, Tennard's own evidence of a 67 I.Q.

was based on a one-page document reflecting a single bare test score.[6] Such evidence pales next to Dr. Wright's detailed testimony about Mr. Cole's deficient performance on objective tests indicating neurological impairment.[7]

D. Mr. Cole's experts did not dispute that, as a result of his destructive childhood experiences, Mr. Cole was presently dangerous and would likely remain dangerous for "years" to come.

Respondent's defense of Mr. Cole's death sentence ultimately reduces to the claim that the defense experts' testimony provided jurors a vehicle for giving meaningful mitigating effect to Mr. Cole's deprived and neglected background, resulting mental and emotional disorders, and neurologically impaired impulse control. *See* RB 33-34. Both parties agree that Mr. Cole's experts did *not*

---

[6] Tennard's jury heard no evidence whatsoever regarding what an I.Q. score meant or what a "normal" I.Q. was; nor any evidence about "when or where the I.Q. test was administered to [Tennard] or if more than one I.Q. test was administered"; nor any evidence about the I.Q. score's reliability or any "scientific or medical explanation of [Tennard]'s I.Q." *See* Joint Appendix, *Tennard v. Dretke*, No. 02-10038 (O.T. 2002) at 73. In each of these ways, the testimony about Mr. Cole's neurological impairment was stronger, richer, and better developed than the mitigating evidence that ultimately required *Penry* relief in *Tennard*.

[7] Like the court below, Respondent suggests, without any support in the record, that Mr. Cole's neurological dysfunction *itself* would abate over time. *See* RB 36; *cf.* JA at 242 (comment by the Fifth Circuit that the evidence at Mr. Cole's trial "suggest[ed] that even someone with . . . an organic neurological deficiency changes later in life"). Even if Mr. Cole's psychodynamic disorders – his emotional and psychological problems – might diminish in intensity as the decades passed, nothing in the trial evidence indicated that the underlying *organic* condition contributing to Mr. Cole's impaired impulse control was likely to improve.

testify that the destructive effects of Mr. Cole's childhood deprivation and neglect were necessarily permanent. The real question is whether the experts' testimony made the "future dangerousness" question a reliable vehicle through which jurors could express the conclusion that, because of the destructive experiences Mr. Cole endured as a child and his resulting emotional and psychological impairment, a sentence less than death was appropriate. For two reasons, the answer must be "no."

First, as Mr. Cole explained in his opening brief, during voir dire the prosecutors instructed the jurors without qualification that they were obliged to answer the special issues literally, and warned them against undertaking any broader inquiry into Mr. Cole's culpability or considering the appropriateness of the sentence their factual "yes" or "no" answers to the "deliberateness" and "future dangerousness" questions would entail. *See* PB 19-21.[8] As a consequence, jurors came to the "future dangerousness"

---

[8] Respondent suggests that *Penry v. Johnson*, 532 U.S. 782 (2001) ("*Penry II*") discounts the importance of voir dire questioning in assessing jurors' likely understanding of their penalty-phase instructions, because of the time that passes between the two. *See* RB 39 n.14 (citing *Penry II*, 532 U.S. at 801). We think Respondent misreads *Penry II* on this point, but in any event the problem was exacerbated here by the fact that the prosecutor specifically *reminded* jurors at closing argument (which took place, after all, only two weeks after voir dire) that they had promised to answer the special issues "yes" if the State met its burden of proof – which the prosecutor had defined at voir dire as excluding "the particular aspects of the case," such as whether "a person had a bad upbringing." *See* PB 20-21. On this record, the voir dire questioning in combination with the prosecutor's closing argument amply supports a finding that the jurors did not understand themselves to be entitled to express in their answers to the "special issues" any broad conclusion about the appropriate sentence for Mr. Cole in light of all the evidence.

question having been inoculated against treating that issue as a vehicle for expressing a judgment about Mr. Cole's moral culpability in light of his background of deprivation and neglect.

More fundamentally, however, it is simply not a fair reading of the testimony of Mr. Cole's experts to suggest that they offered any view other than that Mr. Cole was presently dangerous and would continue to pose a threat of violence for years to come. Mr. Cole's experts straightforwardly acknowledged that he was presently dangerous:

> Q: – Do you feel he's a dangerous person?
>
> A: Yes.
>
> Q: Okay, and isn't it a fact that there's a probability that he would commit criminal acts of violence that would constitute a continuing threat to society in the future? Isn't that correct?
>
> A: I think that probability is stronger than for the rest of us, yes.

JA 81; *see also* JA 74 (if Mr. Cole "were released today on the street," he would present a "much greater probability of dangerous behavior than w[ould] the rest of us," and it would be "foolish to say otherwise"); JA 108-13 (in response to a "hypothetical" question from the prosecutor that tracked in detail the facts of Mr. Cole's crime and his background, defense expert Dr. Dickerson says he "would be concerned about the future danger of the person" described in the hypothetical, *i.e.*, Mr. Cole). Mr. Cole was thirty-one years old at the time of sentencing, and even so his experts predicted he would remain dangerous until "years from now." JA 74. The actual time frames that were mentioned – for example,

one expert said Mr. Cole might not "necessarily" be dangerous "five, ten, fifteen years from now," *see* JA 102 – all projected Mr. Cole's dangerousness to continue for a long time.[9] And if that were not enough, the *Fifth Circuit itself* earlier acknowledged that "[Mr.] Cole's own experts ... would not deny that he posed a risk of future dangerousness." PB 32 (citing *Cole v. Dretke*, 99 Fed. Appx. 523, 531-32 (5th Cir. 2004)). The same is true of the *convicting* court, which found on state habeas review that Mr. Cole's "own expert witnesses concurred that [he] was a man who showed a probability for future violence," JA 163, and that Mr. Cole's "own expert witnesses testified *at length* about the probability that [he] would be a danger to society." JA 165 (emphasis added). In short, there is ample reason to believe that a reasonable juror would have viewed the testimony of Mr. Cole's experts – even as they provided a mitigating explanation for Mr. Cole's violent propensities – as requiring a "yes" answer to the future dangerousness question. Thus, it simply flies in the face of this record to suggest that the testimony of Mr. Cole's experts somehow transformed the "future dangerousness" question into a vehicle within which his evidence could be given effect *as mitigating*.

[9] In this regard, Respondent's unqualified claim that Dr. Wright predicted that Mr. Cole would burn out "within ten years," *i.e.*, by age forty-one, *see* RB 5, is at best misleading. In support of this assertion, Respondent cites JA 68 and JA 73-74; the former page reflects Dr. Wright's testimony that comparable individuals "tend to begin to make changes at about forty, forty-five, fifty, somewhere in there." JA 68. The latter includes counsel's question about Mr. Cole's prospects for dangerousness "six, ten, twelve, twenty years from now," which elicited Dr. Wright's response that "I think we're looking at years from now." JA 73-74. Contrary to Respondent's claim, nowhere did Dr. Wright flatly predict that Mr. Cole would burn out "within ten years."

CONCLUSION

In opposing review in this Court, Respondent claimed that Mr. Cole's jury "concluded that nothing in his history – not his neurological impairment, not his absentee parents, not his childhood hardships – was sufficiently mitigating to warrant a life sentence for the murder." Respondent's Brief in Opposition at 1. But the record tells a different story. Mr. Cole's jurors were never asked whether the mistreatment Mr. Cole suffered as a child, or his serious mental disorders, were "sufficiently mitigating" to justify withholding the ultimate punishment. Instead, the jurors were told during voir dire that the law required them to put aside any views about the appropriate sentence in light of all the evidence, and answer solely whether the evidence about Mr. Cole's background raised a reasonable doubt as to the "deliberateness" of his crime or the likelihood of his future dangerousness. Given that context, *see* PB 19-24, neither of those questions provided the jury an adequate vehicle for considering and giving meaningful mitigating effect to Mr. Cole's background. As a result, Mr. Cole's death sentence violates *Penry*. This Court should reverse the Fifth Circuit and remand with instructions to grant habeas corpus relief.[10]

---

[10] Mr. Cole still maintains that because he would be entitled to relief under the Fifth Circuit's recent decision in *Nelson v. Quarterman*, ___ F.3d ___, 2006 WL 3592953 (5th Cir. Dec. 11, 2006) (*en banc*), this Court could appropriately determine that it should remand his case to the Fifth Circuit for further review in light of *Nelson* rather than proceed to a full decision on the merits here. In this regard, Mr. Cole notes that Respondent's assertion that "the *en banc* Fifth Circuit's prior denial of rehearing in [Mr. Cole's] case implies that the *Nelson* majority does not view [Mr.] Cole's *Penry I* claim as equivalent to Nelson's," RB 36, is wildly speculative. *En banc* rehearing was granted *sua sponte* in *Nelson* on March 13, 2006. *En banc* rehearing in Mr. Cole's case was

(Continued on following page)

Respectfully submitted,

*ROBERT C. OWEN
CAPITAL PUNISHMENT CENTER
UNIVERSITY OF TEXAS
SCHOOL OF LAW
727 East Dean Keeton
Austin, TX 78705
(512) 232-9391
(512) 232-9171 (facsimile)
**Counsel of Record for Petitioner*

RAOUL D. SCHONEMANN
3774 Harrison Street
Oakland, CA 94611
(510) 654-1192
(415) 904-5635 (facsimile)

JORDAN M. STEIKER
CAPITAL PUNISHMENT CENTER
UNIVERSITY OF TEXAS
SCHOOL OF LAW
727 East Dean Keeton
Austin, TX 78705
(512) 232-1346
(512) 471-6988 (facsimile)

---

denied just four days later, on March 17. Supplemental briefs were filed in *Nelson* on April 7 and May 3, oral argument followed on May 16, and the eventual *en banc* decision in *Nelson* was released December 11. Unless one assumes that every judge on the *en banc* Fifth Circuit knew how she was going to vote in *Nelson* four days after granting *en banc* rehearing in that case (*i.e.*, weeks before receiving the briefs, much less hearing oral argument), then the denial of *en banc* rehearing in Mr. Cole's case on March 17, 2006 cannot reasonably be taken to imply *any* view about the merits of Mr. Cole's *Penry* claim vis-à-vis Mr. Nelson's. This argument is as unpersuasive as Respondent's mischaracterization of the status of *Brewer* post-*Nelson*. Taken at its word, the Fifth Circuit's order denying *en banc* review expresses no substantive view about the effect of *Nelson* on *Brewer*. *See Brewer v. Quarterman*, 2006 WL 3787960 (5th Cir. 2006). Yet, Respondent would have the Court treat that order as reflecting a considered conclusion that *Nelson* leaves *Brewer* undisturbed. All that aside, Mr. Cole simply seeks the shortest path to obtaining relief from his unconstitutional death sentence, whether that lies in this Court or in the Fifth Circuit.

Nos. 05-11284 & 05-11287

Supreme Court, U.S.
FILED
NOV 27 2006
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JALIL ABDUL-KABIR, fka TED CALVIN COLE,
Petitioner,

v.

NATHANIEL QUARTERMAN, Director, Texas Department of Criminal Justice, Correctional Institutions Division,
Respondent.

BRENT RAY BREWER,
Petitioner,

v.

NATHANIEL QUARTERMAN, Director, Texas Department of Criminal Justice, Correctional Institutions Division,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE AMERICAN ACADEMY OF CHILD AND ADOLESCENT PSYCHIATRY, THE AMERICAN ASSOCIATION ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, THE ARC OF THE UNITED STATES, MENTAL HEALTH AMERICA, AND THE NATIONAL ALLIANCE ON MENTAL ILLNESS, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Of Counsel

STEPHEN K. HARPER

JAMES W. ELLIS *
CAROL M. SUZUKI
NORMAN C. BAY
STEVEN K. HOMER
APRIL LAND
1117 Stanford, NE
Albuquerque, NM 87131
(505) 277-2146

* Counsel of Record

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI*	1
SUMMARY OF ARGUMENT	1
ARGUMENT	2
I. THIS COURT HAS LONG RECOGNIZED THE CRITICAL IMPORTANCE OF AFFORDING JURIES A FULL OPPORTUNITY TO CONSIDER AND GIVE WEIGHT TO MITIGATING EVIDENCE IN CAPITAL SENTENCING	2
II. EVIDENCE OF ABUSE AND TRAUMA DURING CHILDHOOD CAN BE POWERFULLY MITIGATING, BUT CONSTITUTES A TWO-EDGED SWORD	4
Development of the Brain	5
Stress and PTSD	10
Physical Abuse and Brain Injuries	12
Severe Neglect	19
Sexual and Emotional Abuse	21
Mental Illness and Disability Resulting from Abuse	23
III. EVIDENCE OF A CAPITAL DEFENDANT'S MENTAL ILLNESS ALSO CONSTITUTES A TWO-EDGED SWORD	25
CONCLUSION	28
APPENDIX	1a

TABLE OF AUTHORITIES

SUPREME COURT CASES — Page

DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989) 4
Graham v. Collins, 506 U.S. 461 (1993) 3
Johnson v. Texas, 509 U.S. 350 (1993) 3, 27
Jurek v. Texas, 428 U.S. 262 (1976) 3
Lockett v. Ohio, 438 U.S. 586 (1978) 2
Penry v. Johnson, 532 U.S. 782 (2001) 3
Penry v. Lynaugh, 492 U.S. 302 (1989) 3, 25
Tennard v. Dretke, 542 U.S. 274 (2004) 3
Wiggins v. Smith, 539 U.S. 510 (2003) 3

FEDERAL STATUTES

42 U.S.C. § 5101 *et seq.* 4
42 U.S.C. § 5106(g) (2000) 20
Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247 (1974) 4
H.R. Rep. No. 93-685 (1973), *reprinted in* 1974 U.S.C.C.A.N. 2763 4

MISCELLANEOUS AUTHORITIES

Adolphs, Ralph, Simon Baron-Cohen & Daniel Tranel, *Impaired Recognition of Social Emotions Following Amygdala Damage*, 14 J. Cognitive Neuroscience 1264 (2002) 8
Aldrich, C. Knight, *An Introduction to Dynamic Psychiatry* (1966) 27
American Association on Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Supports* (10th ed. 2002) 14
American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (4th ed., text rev. 2000) (DSM-IV-TR) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page

Anda, Robert F., Vincent J. Felitti et al., *The Enduring Effects of Abuse and Related Adverse Experiences in Childhood: A Convergence of Evidence from Neurobiology and Epidemiology*, 256 Eur. Archives Psychiatry & Clinical Neuroscience 174 (2006) 10, 23

Anderson, Vicki, Cathy Catroppa et al., *Functional Plasticity or Vulnerability After Early Brain Injury?*, 116 Pediatrics 1374 (2005)..... 14

Ayoub, Catherine C., Erin O'Connor et al., *Cognitive and Emotional Differences in Young Maltreated Children: A Translational Application of Dynamic Skill Theory*, 18 Development & Psychopathology 679 (2006) .. 12

The Battered Child (Ray E. Helfer & C. Henry Kempe eds., 2d ed. 1974) 4

Beers, Sue R., & Michael D. De Bellis, *Neuropsychological Function in Children with Maltreatment-Related Posttraumatic Stress Disorder*, 159 Am. J. Psychiatry 483 (2002)..... 14, 24

Bigler, Erin D., Carol V. Anderson & Duane D. Blatter, *Temporal Lobe Morphology in Normal Aging and Traumatic Brain Injury*, 23 Am. J. Neuroradiology 255 (2002) 13

Birmaher, Boris & Daniel T. Williams, *30 Acquired Brain Disorders*, in *Child and Adolescent Psychiatry: A Comprehensive Textbook* 371 (Melvin Lewis ed., 2d ed. 1991)..... 24

Bremner, J. Douglas, *Long-Term Effects of Childhood Abuse on Brain and Neurobiology*, 12 Child & Adolescent Psychiatric Clinics N. Am. 271 (2003)..... 24

TABLE OF AUTHORITIES—Continued

Page

Bremner, J. Douglas & Eric Vermetten, *Stress and Development: Behavioral and Biological Consequences*, 13 Development & Psychopathology 473 (2001) 11

Brown, Angela & David Finkelhor, *Impact of Child Sexual Abuse: A Review of the Research*, 99 Psychological Bulletin 66 (1986) 21

Bryer, Jeffrey B., Bernadette A. Nelson et al., *Childhood Sexual and Physical Abuse as Factors in Adult Psychiatric Illness*, 144 Am. J. Psychiatry 1426 (1987) 9

Carrion, Victor G., Carl F. Weems et al., *Attenuation of Frontal Asymmetry in Pediatric Posttraumatic Stress Disorder*, 50 Biological Psychiatry 943 (2001) 24

Chapin, Henry Dwight, *Systematized Boarding Out vs. Institutional Care for Infants and Young Children*, 105 N.Y. Med. J. 1009 (1917) 20

Chugani, Harry T., Michael E. Behen et al., *Local Brain Functional Activity Following Early Deprivation: A Study of Post-Institutionalized Romanian Orphans*, 14 Neuroimage 1290 (2001) 20

Corrigan, Patrick W. & Amy E. Cooper, *Mental Illness and Dangerousness* (Patrick W. Corrigan ed., American Psychological Association 2005) 26

Coyle, Joseph T. & Steven E. Hyman, *The Neuroscientific Foundations of Psychiatry*, in *Textbook of Psychiatry* 3 (Robert E. Hales, Stuart C. Yudofsky & John A. Talbott eds., 3d ed. 1999) 27

TABLE OF AUTHORITIES—Continued

Page

De Bellis, Michael D., *Developmental Traumatology: A Contributory Mechanism for Alcohol and Substance Abuse Disorders*, 27 Psychoneuroendocrinology 155 (2002) 15

De Bellis, Michael D., *Developmental Traumatology: The Psychobiological Development of Maltreated Children and Its Implications for Research, Treatment, and Policy*, 13 Development & Psychopathology 539 (2001) 16, 23

De Bellis, Michael D., *The Psychobiology of Neglect*, 10 Child Maltreatment 150 (2005) 6, 21

De Bellis, Michael D., Andrew S. Baum et al., *Developmental Traumatology Part I: Biological Stress Systems*, 45 Biological Psychiatry 1259 (1999) 11

De Bellis, Michael D., Elsie R. Broussard et al., *Psychiatric Co-Morbidity in Caregivers and Children Involved in Maltreatment: A Pilot Research Study with Policy Implications*, 25 Child Abuse & Neglect 923 (2001) 5, 23

De Bellis, Michael D., Matcheri S. Keshavan et al., *Brain Structures in Pediatric Maltreatment-Related Posttraumatic Stress Disorder: A Sociodemographically Matched Study*, 52 Biological Psychiatry 1066 (2002) 17-18

De Bellis, Michael D., Matcheri S. Keshavan et al., *Developmental Traumatology Part II: Brain Development*, 45 Biological Psychiatry 1271 (1999) 12, 24

De Bellis, Michael D. & Maragatha Kuchibhatla, *Cerebellar Volumes in Pediatric Maltreatment-Related Posttraumatic Stress Disorder*, 60 Biological Psychiatry 697 (2006) 18

TABLE OF AUTHORITIES—Continued

	Page
Dennis, Wayne, *Children of the Crèche* (1973)	20
Diamond, Adele, *Normal Development of Prefrontal Cortex from Birth to Young Adulthood: Cognitive Functions, Anatomy and Biochemistry*, in *Principles of Frontal Lobe Function* 466 (Donald T. Stuss & Robert T. Knight eds., Oxford U. Press 2002)	6
DiScala, Carla, Robert Sege et al., *Child Abuse and Unintentional Injuries: A 10-Year Retrospective*, 154 Archives Pediatrics & Adolescent Med. 16 (2000)	13
Dong, Maxia, Robert F. Anda et al., *The Relationship of Exposure to Childhood Sexual Abuse to Other Forms of Abuse, Neglect, and Household Dysfunction During Childhood*, 27 Child Abuse & Neglect 625 (2003)	5, 22
Dube, Shanta R., Vincent J. Felitti et al., *The Impact of Adverse Childhood Experiences on Health Problems: Evidence from Four Birth Cohorts Dating Back to 1900*, 37 Preventive Medicine 268 (2003)	21
Edwards, Valerie J., George W. Holden et al., *Relationship Between Multiple Forms of Childhood Maltreatment and Adult Mental Health in Community Respondents: Results from the Adverse Childhood Experiences Study*, 160 Am. J. Psychiatry 1453 (2003)	5
Everett, Barbara & Ruth Gallop, *The Link Between Childhood Trauma and Mental Illness* (2001)	9

TABLE OF AUTHORITIES—Continued

Page

Ewing-Cobbs, Linda, Marcia Barnes et al., *Modeling Longitudinal Academic Achievement Scores After Pediatric Traumatic Brain Injury*, 25 Developmental Neuropsychology 107 (2004)..... 14

Ewing-Cobbs, Linda, Larry Kramer et al., *Neuroimaging, Physical, and Developmental Findings After Inflicted and Noninflicted Traumatic Brain Injury in Young Children*, 102 Pediatrics 300 (1998)..... 13

Famularo, Richard, Robert Kinscherff & Terence Fenton, *Posttraumatic Stress Disorder Among Children Clinically Diagnosed as Borderline Personality Disorder*, 179 J. Nervous & Mental Disease 428 (1991)..... 11

Fujii, Daryl & Iqbal Ahmed, *Characteristics of Psychotic Disorder Due to Traumatic Brain Injury: An Analysis of Case Studies in the Literature*, 14 J. Neuropsychiatry & Clinical Neurosciences 130 (2002)..... 16

Gelder, Michael, Dennis Gath et al., *Oxford Textbook of Psychiatry* (3d ed. 1996)..... 11, 27

Guyer, Amanda E., Joan Kaufman et al., *Behavioral Alterations in Reward System Function: The Role of Childhood Maltreatment and Psychopathology*, 45 J. Am. Acad. Child & Adolescent Psychiatry 1059 (2006)..... 16

Heffernan, Karen, Marylene Cloitre et al., *Childhood Trauma as a Correlate of Lifetime Opiate Use in Psychiatric Patients*, 25 Addictive Behaviors 797 (2000)..... 15

TABLE OF AUTHORITIES—Continued

Page

Heim, Christine, D. Jeffrey Newport et al., *Altered Pituitary-Adrenal Axis Responses to Provocative Challenge Tests in Adult Survivors of Childhood Abuse*, 158 Am. J. Psychiatry 575 (2001) 22

Hollandsworth, James G., Jr., *The Physiology of Psychological Disorders: Schizophrenia, Depression, Anxiety, and Substance Abuse* (1990) 27

Horner, Michael David, Pamela L. Ferguson et al., *Patterns of Alcohol Use 1 Year After Traumatic Brain Injury: A Population-Based, Epidemiological Study*, 11 J. Int'l Neuropsychol. Soc. 322 (2005) 15

Huttenlocher, Peter R., *Synaptogenesis in Human Cerebral Cortex*, in *Human Behavior and the Developing Brain* 137 (Geraldine Dawson & Kurt W. Fischer eds., 1994) 8

Ito, Yutaka, Martin H. Teicher et al., *Preliminary Evidence for Aberrant Cortical Development in Abused Children: A Quantitative EEG Study*, 10 J. Neuropsychiatry & Clinical Neurosciences 298 (1998) 18

Jorge, Ricardo E., *Neuropsychiatric Consequences of Traumatic Brain Injury: A Review of Recent Findings*, 18 Current Opinion in Psychiatry 289 (2005) 14, 16

Jorge, Ricardo E., Robert G. Robinson et al., *Major Depression Following Traumatic Brain Injury*, 61 Archives Gen. Psychiatry 42 (2004) 16

TABLE OF AUTHORITIES—Continued

Page

Jorge, Ricardo E., Sergio E. Sarkstein et al., *Alcohol Misuse and Mood Disorders Following Traumatic Brain Injury*, 62 Archives Gen. Psychiatry 742 (2006)..... 15

Joshi, Paramjit T., Peter T. Daniolos & Jay A. Salpekar, *Physical Abuse of Children*, in *Textbook of Child and Adolescent Psychiatry* 842 (Jerry M. Wiener et al. eds., 3d ed. 2004) .. 8-9, 24

Kaplan, Sandra J., David Pelcovitz & Victor Labruna, *Child and Adolescent Abuse and Neglect Research: A Review of the Past 10 Years, Part I: Physical and Emotional Abuse and Neglect*, 38 J. Am. Acad. Child & Adolescent Psychiatry 1214 (1999)..... 11, 21, 23

Kaufman, Joan & Dennis Charney, *Effects of Early Stress on Brain Structure and Function: Implications for Understanding the Relationship Between Child Maltreatment and Depression*, 13 Development & Psychopathology 451 (2001)..... 11, 24

Keenan, Heather T., Desmond K. Runyan & Maryalice Nocera, *Child Outcomes and Family Characteristics 1 Year After Severe Inflicted or Noninflicted Traumatic Brain Injury*, 117 Pediatrics 317 (2006)..... 13

Keenan, Heather T., Desmond K. Runyan et al., *A Population-Based Comparison of Clinical and Outcome Characteristics of Young Children with Serious Inflicted and Noninflicted Traumatic Brain Injury*, 114 Pediatrics 633 (2004)..... 13

TABLE OF AUTHORITIES—Continued

Page

Langlois, Jean A., Wesley Rutland-Brown et al., *The Epidemiology and Impact of Traumatic Brain Injury*, 21 J. Head Trauma Rehabilitation 375 (2006) 12

Lanktree, Cheryl, John Briere & Lisa Zaidi, *Incidence and Impact of Sexual Abuse in a Child Outpatient Sample: The Role of Direct Inquiry*, 15 Child Abuse & Neglect 447 (1991) 21

Levy, Howard B., John Marcovic et al., *Re-Abuse Rates in a Sample of Children Followed for 5 Years After Discharge from a Child Abuse Inpatient Assessment Program*, 19 Child Abuse & Neglect 1363 (1995) 5

Masten, Ann S., Jon J. Hubbard et al., *Competence in the Context of Adversity: Pathways to Resilience and Maladaptation from Childhood to Late Adolescence*, 11 Development & Psychopathology 143 (1999) .. 19

Max, Jeffrey E., Harvey S. Levine et al., *Predictors of Personality Change Due to Traumatic Brain Injury in Children and Adolescents Six to Twenty-Four Months After Injury*, 18 J. Neuropsychiatry & Clinical Neurosciences 21 (2006) 15

Max, Jeffrey Edwin, Brigette Anna Marie Robertson et al., *The Phenomenology of Personality Change Due to Traumatic Brain Injury in Children and Adolescents*, 13 J. Neuropsychiatry & Clinical Neurosciences 161 (2001) 15

TABLE OF AUTHORITIES—Continued

Page

Max, Jeffrey E., Donald A. Robin et al., *Traumatic Brain Injury in Children and Adolescents: Psychiatric Disorders at One Year*, 10 J. Neuropsychiatry 290 (1998) 16

McCarthy, Melissa L., Ellen J. MacKenzie et al., *Health-Related Quality of Life During the First Year After Traumatic Brain Injury*, 160 Archives Pediatrics & Adolescent Med. 252 (2006) 14, 24

McEwen, Bruce S., *Early Life Influences on Life-Long Patterns of Behavior and Health*, 9 Mental Retardation & Developmental Disability Research Rev. 149 (2003) 8

McGloin, Jean Marie & Cathy ~~Spatz~~ Widom, *Resilience Among Abused and Neglected Children Grown Up*, 13 Development & Psychopathology 1021 (2001) 19

Mental Health: A Report of the Surgeon General (U.S. Dep't Health & Human Serv. 1999) 6

Moeller, F. Gerard, Ernest S. Barratt et al., *Psychiatric Aspects of Impulsivity*, 158 Am. J. Psychiatry 1783 (2001) 7, 15

Myers, Wade C., Kerrilyn Scott et al., *Psychopathology, Biopsychosocial Factors, Crime Characteristics, and Classification of 25 Homicidal Youths*, 34 J. Am. Acad. Child & Adolescent Psychiatry 1483 (1995) 15

National Institutes of Health, *Rehabilitation of Persons with Traumatic Brain Injury*, 282 JAMA 974 (Consensus Development Panel 1999) 12

TABLE OF AUTHORITIES—Continued

Page

Nelson, Charles A. & Leslie J. Carver, *The Effects of Stress and Trauma on Brain and Memory: A View from Developmental Cognitive Neuroscience*, 10 Development & Psychopathology 793 (1998) 7, 11

Pace, Thaddeus W.W., Tanja C. Mletzko et al., *Increased Stress-Induced Inflammatory Responses in Male Patients with Major Depression and Increased Early Life Stress*, 163 Am. J. Psychiatry 1630 (2006) 11

Pears, Katherine C. & Deborah M. Capaldi, *Intergenerational Transmission of Abuse: A Two-Generational Prospective Study of an At-Risk Sample*, 25 Child Abuse & Neglect 1439 (2001) 23

Perez, Cynthia M. & Cathy Spatz Widom, *Childhood Victimization and Long-Term Intellectual and Academic Outcomes*, 18 Child Abuse & Neglect 617 (1994) 20, 21, 24

Perry, Bruce D., *Applying Principles of Neurodevelopment to Clinical Work with Maltreated and Traumatized Children: The Neurosequential Model of Therapeutics*, in *Working with Traumatized Youth in Child Welfare* 27 (Nancy Boyd Webb ed., 2006) 9

Perry, Bruce D., *Childhood Experience and the Expression of Genetic Potential: What Childhood Neglect Tells Us About Nature and Nurture*, 3 Brain & Mind 79 (2002) 8, 21

TABLE OF AUTHORITIES—Continued

Page

Perry, Bruce D., *Neurodevelopmental Impact of Violence in Childhood*, in *Principles and Practice of Child and Adolescent Forensic Psychiatry* 191 (Diane H. Schetky & Elissa P. Benedek eds., American Psychiatric Association 2002) 6

Perry, Bruce D., & Ronnie Pollard, *Homeostasis, Stress, Trauma, and Adaptation: A Neurodevelopmental View of Childhood Trauma*, 7 Child & Adolescent Psychiatric Clinics N. Am. 33 (1998) 6, 20

Perry, Bruce D., Ronnie A. Pollard et al., *Childhood Trauma, the Neurobiology of Adaptation, and "Use-Dependent" Development of the Brain: How "States" Become "Traits,"* 16 Infant Mental Health J. 271 (1995) 7

Pescosolido, Bernice A., John Monahan et al., *The Public's View of the Competence, Dangerousness, and Need for Legal Coercion of Persons with Mental Health Problems*, 89 Am. J. Pub. Health 1339 (1999) 26

Phelan, Jo C., Bruce G. Link et al., *Public Conceptions of Mental Illness in 1950 and 1996: What Is Mental Illness and Is It to be Feared?*, 41 J. Health & Social Behav. 188 (2000) 26

Pollak, Seth, Dante Cicchetti & Rafael Klorman, *Stress, Memory, and Emotion: Developmental Considerations from the Study of Child Maltreatment*, 10 Development & Psychopathology 811 (1998) 11-12

TABLE OF AUTHORITIES—Continued

Page

Putnam, Frank W., *Ten-Year Research Update Review: Child Sexual Abuse*, 42 J. Am. Acad. Child & Adolescent Psychiatry 269 (2003)..... 12, 22

Putnam, Frank W., & Penelope K. Trickett, *Psychobiological Effects of Sexual Abuse: A Longitudinal Study*, 821 Annals N.Y. Acad. Sci. 150 (1997)..... 22

Reid, Samuel R., Jon S. Roesler et al., *The Epidemiology of Pediatric Traumatic Brain Injury in Minnesota*, 155 Archives Pediatrics & Adolescent Med. 784 (2001)..... 13

Rutter, Michael, Lucie Andersen-Wood et al., *Quasi-Autistic Patterns Following Severe Early Global Privation*, 40 J. Child Psychology & Psychiatry 537 (1999)..... 20

Salzinger, Suzanne, Richard S. Feldman et al., *The Effect of Physical Abuse on Children's Social and Affective Status: A Model of Cognitive and Behavioral Processes Explaining the Association*, 13 Development & Psychopathology 805 (2001)..... 19

Sarapata, Michael, Douglas Herrmann et al., *The Role of Head Injury in Cognitive Functioning, Emotional Adjustment and Criminal Behavior*, 12 Brain Injury 821 (1998)..... 15

Saywitz, Karen J., Anthony P. Mannarino et al., *Treatment for Sexually Abused Children and Adolescents*, in *Annual Progress in Child Psychiatry and Child Development* 455 (Margaret E. Hertzig & Ellen A. Farber eds., 2003)..... 22

TABLE OF AUTHORITIES—Continued

Page

Scheeringa, Michael S., Charles H. Zeanah et al., *Two Approaches to the Diagnosis of Posttraumatic Stress Disorder in Infancy and Early Childhood*, 34 J. Am. Acad. Child & Adolescent Psychiatry 191 (1995) 17

Slomine, Beth S., Melissa L. McCarthy et al., *Health Care Utilization and Needs After Pediatric Traumatic Brain Injury*, 117 Pediatrics 663 (2006) 14

Swanson, Jeffrey W., *Mental Disorder, Substance Abuse, and Community Violence: An Epidemiological Approach*, in *Violence and Mental Disorder: Developments in Risk Assessment* 101 (John Monahan & Henry J. Steadman eds., 1994) 26

Tebbutt, Jennifer, Heather Swanston et al., *Five Years After Child Sexual Abuse: Persisting Dysfunction and Problems of Prediction*, 36 J. Am. Acad. Child & Adolescent Psychiatry 330 (1997) 22

Teicher, Martin H., Susan L. Andersen et al., *Developmental Neurobiology of Childhood Stress and Trauma*, 25 Psychiatric Clinics N. Am. 397 (2002) 10, 18

Teicher, Martin H., Jacqueline A. Samson et al., *Sticks, Stones, and Hurtful Words: Relative Effects of Various Forms of Childhood Maltreatment*, 163 Am. J. Psychiatry 993 (2006) 23

Trimble, Michael R., *Biological Psychiatry* (2d ed. 1996) 27

TABLE OF AUTHORITIES—Continued

Page

U.S. Department of Health and Human Services, *Child Maltreatment 2002: Reports from the States to the National Child Abuse and Neglect Data System* (2002) 20

van Reekum, Robert, Tammy Cohen & Jenny Wong, *Can Traumatic Brain Injury Cause Psychiatric Disorders?*, 12 J. Neuropsychiatry & Clinical Neurosciences 316 (2000) 16

Volavka, Jan, *The Neurobiology of Violence: An Update*, 11 J. Neuropsychiatry & Clinical Neurosciences 307 (1999) 12

Vythilingam, Meena, Christine Heim et al., *Childhood Trauma Associated with Smaller Hippocampal Volume in Women with Major Depression*, 159 Am. J. Psychiatry 2072 (2002)..... 18

Wahl, Otto F., *Media Madness: Public Images of Mental Illness* (1995)..... 26

Weber, Deborah A. & Cecil R. Reynolds, *Clinical Perspectives on Neurobiological Effects of Psychological Trauma*, 14 Neuropsychology Rev. 115 (2004)..... 9

INTEREST OF *AMICI CURIAE*

Amici are national clinical and mental disability organizations (more fully described in the Appendix) with long-standing concerns about legal protections for people with mental disabilities.[1]

SUMMARY OF ARGUMENT

Medical understanding of the consequences of child abuse has made important advances in recent decades. We now know much more about the physical effects of abuse on the child's developing brain. We also have a better understanding of how neurological damage can affect an individual's later behavior, particularly if the abuse goes unrecognized and its effects go untreated during childhood. We are also gaining a fuller understanding of serious mental illness.

This brief summarizes the recent scientific and medical research (almost all of which is published in peer-reviewed journals) on child abuse and mental illness. In particular, Part II of the brief addresses the processes of the development of the brain, the clinical effects of stress and PTSD, physical injuries to the brain, and the effects of sexual and emotional abuse, as well as the mental health and cognitive effects of childhood abuse on adults. Part III of the brief also addresses our understanding of the effects of serious mental illness (whether it is caused by abuse or by other factors).

Evidence that a capital defendant suffered abuse as a child can be a crucial consideration to jurors who are deciding whether to impose the death penalty. Evidence of abuse can be a powerful mitigator because it can help jurors understand why the defendant acted as he did, and help them evaluate

---

[1] This brief was written entirely by counsel for *amici*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief. All parties have given written consent to the filing of this brief.

whether his level of personal culpability warrants the punishment of death. The reason the evidence is potentially mitigating is *not* because it reassures jurors that the defendant is unlikely to commit dangerous acts in the future; indeed, it may persuade them that he is *more* likely to re-offend because they believe that the effects of the abuse may be permanent or the symptoms may recur.

Similarly, evidence that a defendant had a substantial mental illness at the time of the crime can help jurors evaluate the level of his personal culpability. But if jurors are persuaded by the evidence of his mental illness, they may still conclude that the mental illness makes him more likely to be dangerous in the future.

Given the two-edged nature of child abuse and mental illness evidence, the exclusive focus of the Texas "special issues" system on a defendant's prospective dangerousness places the mitigating significance of that evidence beyond the effective reach of capital jurors.

ARGUMENT

I. THIS COURT HAS LONG RECOGNIZED THE CRITICAL IMPORTANCE OF AFFORDING JURIES A FULL OPPORTUNITY TO CONSIDER AND GIVE WEIGHT TO MITIGATING EVIDENCE IN CAPITAL SENTENCING.

A capital jury's evaluation of relevant facts about a defendant is central to the fairness of the determination of whether the defendant should live or die. As Chief Justice Burger observed nearly three decades ago, the Constitution does not permit states to interfere with sentencers' ability to give "independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation." *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion). And the Court has

frequently observed that evidence about a defendant's abuse as a child, and evidence of mental impairment, are particularly "powerful" factors in mitigation. *Wiggins v. Smith*, 539 U.S. 510, 534 (2003). *See Penry v. Lynaugh*, 492 U.S. 302, 337 (1989) ("[V]irtually all of the States with death penalty statutes that list statutory mitigating factors include as a mitigating circumstance evidence that '[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.'"); *Tennard v. Dretke*, 542 U.S. 274, 287 (2004) ("impaired intellectual functioning is inherently mitigating").

States that have the death penalty vary in the precise rules guiding the process by which juries evaluate aggravating and mitigating evidence. But while states may guide the consideration of mitigating evidence, they may neither categorically exclude, nor place out of jurors' effective reach, factors that could inform their understanding of defendant and his actions. *See Johnson v. Texas*, 509 U.S. 350, 372-73 (1993); *Graham v. Collins*, 506 U.S. 461, 475 (1993).

The system adopted by Texas to focus the penalty phase on particular "special issues" has engendered considerable constitutional litigation. This Court has upheld the statute's overall structure, *see Jurek v. Texas*, 428 U.S. 262 (1976), but has insisted that the state cannot impede jurors' consideration of mitigating evidence that its special issues do not reasonably accommodate. *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Penry v. Johnson*, 532 U.S. 782 (2001); *Tennard v. Dretke*, 542 U.S. 274 (2004). In particular, the Court has stressed that the special issues may not provide the jury an adequate vehicle for making the sentencing decision when the defendant's proffered evidence is "a two-edged sword [that] may diminish his blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future." *Penry v. Lynaugh*, 492 U.S. at 324.

Amici believe that evidence of child abuse and mental illness are similarly two-edged swords.

II. EVIDENCE OF ABUSE AND TRAUMA DURING CHILDHOOD CAN BE POWERFULLY MITIGATING, BUT CONSTITUTES A TWO-EDGED SWORD.

Although there were earlier clinical studies and evaluations, widespread public recognition of the problems and consequences of child abuse developed in the 1970s.[2] This increased awareness led Congress to enact the Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247 (1974), which has been repeatedly expanded and updated and is now codified at 42 U.S.C. § 5101 *et seq.* (Child Abuse Prevention and Treatment and Adoption Act).

As our society's awareness of child abuse and trauma has increased, substantial advances have been made by researchers and clinicians in understanding both the causes and the long-term effects of such injuries. These findings about the effects of abuse and trauma on children, and the effects on their functioning later in life, are particularly relevant to the issue of mitigation evidence in capital trials involving individuals who experienced serious harm as children.

The abuse of children takes many forms.[3] It may involve battering and other physical abuse, severe neglect, emotional mistreatment, or sexual abuse. Far too many children suffer

---

[2] *See generally* H.R. Rep. No. 93-685 (1973), *reprinted in* 1974 U.S.C.C.A.N. 2763. *See also The Battered Child* (Ray E. Helfer & C. Henry Kempe eds., 2d ed. 1974).

[3] Sadly, this Court is not unfamiliar with the appalling consequences of the abuse of children. *See DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 191-93 (1989).

abuse that involves more than one of these categories.[4] In addition, children can be drastically affected by traumatic events experienced in their early lives, including such events as the violent deaths of loved ones or extreme emotional neglect.[5]

To appreciate the significance of child abuse in capital sentencing, it is necessary to understand the process of the brain's development and the damage that various forms of abuse can cause.

Development of the Brain

The human brain develops and organizes at an explosive rate in the first years of life. As a result, major childhood events can have an extraordinary and enduring effect. Our scientific understanding of this phenomenon has advanced dramatically in recent decades. In particular, we now

---

[4] In one major study, "81% of maltreated child and adolescent subjects reported that they experienced more than one type of maltreatment. Fifty-three percent of these maltreated children experienced at least three types of maltreatment during their lives." Michael D. De Bellis, Elsie R. Broussard et al., *Psychiatric Co-Morbidity in Caregivers and Children Involved in Maltreatment: A Pilot Research Study with Policy Implications*, 25 Child Abuse & Neglect 923, 937 (2001); *see also* Valerie J. Edwards, George W. Holden et al., *Relationship Between Multiple Forms of Childhood Maltreatment and Adult Mental Health in Community Respondents: Results from the Adverse Childhood Experiences Study*, 160 Am. J. Psychiatry 1453 (2003); Howard B. Levy, John Marcovic et al., *Re-Abuse Rates in a Sample of Children Followed for 5 Years After Discharge from a Child Abuse Inpatient Assessment Program*, 19 Child Abuse & Neglect 1363 (1995); Maxia Dong, Robert F. Anda et al., *The Relationship of Exposure to Childhood Sexual Abuse to Other Forms of Abuse, Neglect, and Household Dysfunction During Childhood*, 27 Child Abuse & Neglect 625, 635 (2003) (counseling diagnosticians to be watchful for multiple forms of abuse of the same child).

[5] *See, e.g.*, De Bellis, Broussard et al., *supra* note 4, at 937 ("The majority of maltreated child and adolescent subjects reported that they witnessed domestic violence (85%).").

understand more fully the *physical* and *long lasting* effects of biological and neurological changes in the brain when the child becomes an adult.[6]

This understanding arises from our increased knowledge about the growth and evolution of the brain during childhood. "The period from birth to adulthood is marked by progressive physical, behavioral, cognitive, and emotional development. Paralleling these stages are changes in brain maturation."[7] In normal development, the child's brain begins with the most basic, even primitive, functions and abilities. Starting with the development of the brainstem, the child consolidates basic abilities to alert the nervous system to stimuli, monitor and maintain the basic internal environment of the body (known as homeostasis), and sense events in the child's environment.

This sequential development continues in later months and years, and the child's brain acquires the ability to perform somewhat more complex functions, such as processing (rather than merely experiencing) external stimuli and regulating internal emotional responses.[8] These abilities accompany the development of the lobes of the frontal cortex, the amygdala

---

[6] *See* Bruce D. Perry & Ronnie Pollard, *Homeostasis, Stress, Trauma, and Adaptation: A Neurodevelopmental View of Childhood Trauma*, 7 Child & Adolescent Psychiatric Clinics N. Am. 33 (1998).

[7] Michael D. De Bellis, *The Psychobiology of Neglect*, 10 Child Maltreatment 150, 151 (2005). For a general description of the brain's maturation process, see *Mental Health: A Report of the Surgeon General* 32-39 (U.S. Dep't Health & Human Serv. 1999).

[8] Bruce D. Perry, *Neurodevelopmental Impact of Violence in Childhood*, in *Principles and Practice of Child and Adolescent Forensic Psychiatry* 191, 192 (Diane H. Schetky & Elissa P. Benedek eds., American Psychiatric Association 2002). For a particularly helpful explanation of this process, see Adele Diamond, *Normal Development of Prefrontal Cortex from Birth to Young Adulthood: Cognitive Functions, Anatomy and Biochemistry*, in *Principles of Frontal Lobe Function* 466 (Donald T. Stuss & Robert T. Knight eds., Oxford U. Press 2002).

in the center of the brain and other, more advanced, functions. Portions of the mid-brain and the brainstem then acquire the ability to help the higher brain fashion appropriate responses to the environment. As these abilities develop and begin to mature, the child gains more sophisticated skills, allowing him to deal with the outside world and with his own emotional reactions. These developments enable the child to resist impulses and to correct misperceptions of social, as well as potentially threatening, situations.[9]

Unfortunately, this pattern of normal development can be interrupted, arrested, and distorted. And the fact that the child's brain is still developing greatly increases its vulnerability to external threats and harms. "[A]lthough plasticity in the developing brain represents a window of opportunity in normal circumstances, it also represents a period of vulnerability in adverse ones."[10] Different forms of child abuse can transform that vulnerability into lasting damage to the child's mental, emotional, and behavioral development. We now know that those sometimes catastrophic effects can often be traced to physical changes in the brain itself.

The distortions and interruptions of the brain's development that can result from physical trauma and other forms of abuse can have devastating consequences. For example, if the amygdala fails to develop normally, the individual's ability to interpret the emotional expression and communi-

---

[9] F. Gerard Moeller, Ernest S. Barratt et al., *Psychiatric Aspects of Impulsivity*, 158 Am. J. Psychiatry 1783, 1785 (2001) ("research has supported the idea that damage to the frontal cortex is a cause of at least some aspects of impulsivity").

[10] Charles A. Nelson & Leslie J. Carver, *The Effects of Stress and Trauma on Brain and Memory: A View from Developmental Cognitive Neuroscience*, 10 Development & Psychopathology 793 (1998); *see* Bruce D. Perry, Ronnie A. Pollard et al., *Childhood Trauma, the Neurobiology of Adaptation, and "Use-Dependent" Development of the Brain: How "States" Become "Traits,"* 16 Infant Mental Health J. 271, 285 (1995).

cation of other people can be diminished.[11] If the development of the brain's synapses is impaired, the individual may have distorted perceptions and reactions throughout his life.[12] If this maturation process is interrupted or stunted during childhood, the individual, as an adult, may grossly misinterpret situations and respond to them in inappropriate and sometimes tragic ways.

An example of such distorted reactions can involve exaggerated perceptions of physical threats from others. As a child experiences normal development, portions of the midbrain and brainstem acquire the ability to evaluate sensory indications of potential dangers. These instantaneous processes allow the individual to process the so-called "fight-or-flight" decisions necessary to both survival and adaptation to living in society.[13] If the development of these areas of the

---

[11] *See* Ralph Adolphs, Simon Baron-Cohen & Daniel Tranel, *Impaired Recognition of Social Emotions Following Amygdala Damage*, 14 J. Cognitive Neuroscience 1264 (2002); Bruce S. McEwen, *Early Life Influences on Life-Long Patterns of Behavior and Health*, 9 Mental Retardation & Developmental Disability Research Rev. 149, 150 (2003) ("Past experiences during early life, and states of chemical imbalance associated with depressive illness and post-traumatic stress disorder, can bias the ways in which the amygdala performs these functions.").

[12] *See* Peter R. Huttenlocher, *Synaptogenesis in Human Cerebral Cortex*, in *Human Behavior and the Developing Brain* 137-52 (Geraldine Dawson & Kurt W. Fischer eds., 1994). "The synapse is a dynamic structure. . . . When there is little activity, the synaptic connection will literally dissolve. . . . While somewhat simplistic, it appears that synaptic sculpting is a 'use it or lose it' process. . . . This powerful activity-dependent process appears to be the molecular basis of learning, memory and, therefore, at the core of neurodevelopment." Bruce D. Perry, *Childhood Experience and the Expression of Genetic Potential: What Childhood Neglect Tells Us About Nature and Nurture*, 3 Brain & Mind 79, 85 (2002).

[13] In this process, neural signals tend to increase blood flow to the body's large muscles, "telling" the body that it is under threat and that it must either run away or fight. *See* Paramjit T. Joshi, Peter T. Daniolos &

brain is impaired, a child may fail to acquire the neurodevelopmental skills necessary for normal reactions. "Under traumatic conditions, the body's physiology responds by creating biological patterns in the brain that keep the child on guard or hypervigilant. But the body becomes accustomed to the constantly high levels of this 'fight or flight' biological response, which results in a steady state of hyperarousal. These adaptive symptoms, too, become overgeneralized with time and return unbidden when the adult encounters relatively innocent stimuli. As might well be imagined, adult survivors [of abuse] who are always aroused and vigilant have difficulty controlling their emotions and their actions."[14]

As the following sections will demonstrate, child abuse can cause these distortions in the brain's development. However, the nature of this harm may go unrecognized or misdiagnosed during the individual's childhood. Referring to these processes as a "veiled cascade of events," one recent study noted that "[e]xtreme, traumatic or repetitive childhood stressors such as abuse, witnessing or being the victim of

---

Jay A. Salpekar, *Physical Abuse of Children*, in *Textbook of Child and Adolescent Psychiatry* 842 (Jerry M. Wiener et al. eds., 3d ed. 2004).

[14] Barbara Everett & Ruth Gallop, *The Link Between Childhood Trauma and Mental Illness* 27 (2001). *See generally* Deborah A. Weber & Cecil R. Reynolds, *Clinical Perspectives on Neurobiological Effects of Psychological Trauma*, 14 Neuropsychology Rev. 115 (2004); Jeffrey B. Bryer, Bernadette A. Nelson et al., *Childhood Sexual and Physical Abuse as Factors in Adult Psychiatric Illness*, 144 Am. J. Psychiatry 1426 (1987); Bruce D. Perry, *Applying Principles of Neurodevelopment to Clinical Work with Maltreated and Traumatized Children: The Neurosequential Model of Therapeutics*, in *Working with Traumatized Youth in Child Welfare* 27, 34 (Nancy Boyd Webb ed., 2006) ("A young child growing up in a home with pervasive threat, for example, will create a set of associations—primarily precortical and therefore out of his or her conscious awareness—between a host of neutral cues and threat. For the rest of the child's life, these neutral cues will have the capacity to activate a fear response and therefore to alter emotions, behaviors, and physiology.").

domestic violence" are "common, tend to be kept secret, and go unrecognized by the outside world."[15] Sadly, sometimes the damage children suffer is only identified in retrospect. When recognized, even at such a late date, it can help us understand why individuals may have acted as they did. And while not justifying the behavior, that understanding is essential to assessing the level of personal responsibility in deciding whether a capital defendant is to live or die.

Stress and PTSD

In medicine, "stress" is something of a term of art. In its ordinary-language sense, "stress" means the pressures and challenges that are part of all of our (including children's) lives. While confronting stress in this sense is difficult, it is also essential for growth and development. Indeed, if a young child does *not* confront a succession of challenging events, the process of neurological development and learning can be stunted. In that sense, stress is both normal and indispensable.

But when physicians use the term stress regarding pathologies (as in "posttraumatic stress disorder"[16] or "PTSD") they are referring to stressors that exceed what the brain can handle at a particular stage of life. "[S]tress is something in

---

[15] Robert F. Anda, Vincent J. Felitti et al., *The Enduring Effects of Abuse and Related Adverse Experiences in Childhood: A Convergence of Evidence from Neurobiology and Epidemiolgy*, 256 Eur. Archives Psychiatry & Clinical Neuroscience 174, 180 (2006). "Likewise, the fight-or-flight response among children exposed to these types of stressors, and the attendant release of endogenous catecholamines and adrenal corticosteroids are both uncontrollable and invisible." *Id.* In a sense, this "cascade" of life events mirrors the "cascade model" of neurobiological events that follow traumatic stressors on a child's brain. *See* Martin H. Teicher, Susan L. Andersen et al., *Developmental Neurobiology of Childhood Stress and Trauma*, 25 Psychiatric Clinics N. Am. 397, 400 (2002).

[16] For a fuller discussion of PTSD, *see infra* p.17.

the environment that might disrupt or change the normal functioning of an individual, including his or her very assumptions about the nature of the world and the self. Trauma involves stress that is more severe than and exceeds normal human resources for coping."[17]

Not surprisingly, the disruptions of brain function caused by child abuse produce a very high incidence of mental illness in children.[18] Such stressors can also have a substantial impact on a child's behavior.[19] For example, "[a]s

---

[17] Nelson & Carver, *supra* note 10, at 801; *see also* Michael D. De Bellis, Andrew S. Baum et al., *Developmental Traumatology Part I: Biological Stress Systems*, 45 Biological Psychiatry 1259 (1999). For an overview of the biological research, drawing from both human and animal studies, see J. Douglas Bremner & Eric Vermetten, *Stress and Development: Behavioral and Biological Consequences*, 13 Development & Psychopathology 473 (2001). On the characteristics of stress, see generally Michael Gelder, Dennis Gath et al., *Oxford Textbook of Psychiatry* 76 (3d ed. 1996).

[18] *See* Sandra J. Kaplan, David Pelcovitz & Victor Labruna, *Child and Adolescent Abuse and Neglect Research: A Review of the Past 10 Years, Part I: Physical and Emotional Abuse and Neglect*, 38 J. Am. Acad. Child & Adolescent Psychiatry 1214, 1217 (1999). Indeed, there has been a suggestion that the similarity of symptoms between PTSD and other forms of mental illness may lead to confused diagnoses that underreport the incidence of PTSD. *See* Richard Famularo, Robert Kinscherff & Terence Fenton, *Posttraumatic Stress Disorder Among Children Clinically Diagnosed as Borderline Personality Disorder*, 179 J. Nervous & Mental Disease 428, 430 (1991). Among the mental illnesses reported, clinical depression is one of the most widespread among the victims of early childhood stressors. Thaddeus W.W. Pace, Tanja C. Mletzko et al., *Increased Stress-Induced Inflammatory Responses in Male Patients with Major Depression and Increased Early Life Stress*, 163 Am. J. Psychiatry 1630 (2006); Joan Kaufman & Dennis Charney, *Effects of Early Stress on Brain Structure and Function: Implications for Understanding the Relationship Between Child Maltreatment and Depression*, 13 Development & Psychopathology 451 (2001).

[19] Seth Pollak, Dante Cicchetti & Rafael Klorman, *Stress, Memory, and Emotion: Developmental Considerations from the Study of Child Mal-*

a group, individuals with histories of [child sexual abuse], irrespective of their psychiatric diagnosis, manifest significant problems with affect regulation, impulse control, somatization, sense of self, cognitive distortions, and problems with socialization. Many of these processes are believed to have developmentally sensitive neuronal and behavioral periods related to brain maturation and early caretaker interactions."[20]

Physical Abuse and Brain Injuries

Physical injury, particularly traumatic brain injuries (TBI), can have a substantial and adverse effect on a child's neurological development.[21] Such brain injuries can befall children from a variety of causes, including those that are intentionally

---

treatment, 10 Development & Psychopathology 811, 822 (1998) ("[L]ack of flexibility in the regulation of emotion would likely create a mismatch between action and situation, and result in inappropriate behavioral responses. This latter description better characterizes the kinds of problems observed with maltreated children."); *see also* Catherine C. Ayoub, Erin O'Connor et al., *Cognitive and Emotional Differences in Young Maltreated Children: A Translational Application of Dynamic Skill Theory*, 18 Development & Psychopathology 679, 683 (2006) (if "maltreatment is recurrent, which it often is, then these traumatogenic responses become habitual and generalized").

[20] Frank W. Putnam, *Ten-Year Research Update Review: Child Sexual Abuse*, 42 J. Am. Acad. Child & Adolescent Psychiatry 269, 273 (2003) (citation omitted); *see also* Michael D. De Bellis, Matcheri S. Keshavan et al., *Developmental Traumatology Part II: Brain Development*, 45 Biological Psychiatry 1271, 1278-79 (1999). *See generally* Jan Volavka, *The Neurobiology of Violence: An Update*, 11 J. Neuropsychiatry & Clinical Neurosciences 307 (1999).

[21] *See generally* National Institutes of Health, *Rehabilitation of Persons with Traumatic Brain Injury*, 282 JAMA 974 (Consensus Development Panel 1999); Jean A. Langlois, Wesley Rutland-Brown et al., *The Epidemiology and Impact of Traumatic Brain Injury*, 21 J. Head Trauma Rehabilitation 375 (2006).

inflicted and those that are accidental.[22] Apparently those children whose brain injuries are deliberately inflicted, such as the victims of child abuse, may suffer more serious consequences than children whose injuries are accidental.[23] While it is well recognized that such injuries have a substantial impact on the functioning of adult brains,[24] the developmental effects on children's brains are now becoming more fully understood.[25] In addition to adverse effects on a

---

[22] *See* Heather T. Keenan, Desmond K. Runyan et al., *A Population-Based Comparison of Clinical and Outcome Characteristics of Young Children with Serious Inflicted and Noninflicted Traumatic Brain Injury*, 114 Pediatrics 633 (2004). It appears that such injuries occur more frequently to boys than to girls. Samuel R. Reid, Jon S. Roesler et al., *The Epidemiology of Pediatric Traumatic Brain Injury in Minnesota*, 155 Archives Pediatrics & Adolescent Med. 784, 785 (2001).

[23] *See* Linda Ewing-Cobbs, Larry Kramer et al., *Neuroimaging, Physical, and Developmental Findings After Inflicted and Noninflicted Traumatic Brain Injury in Young Children*, 102 Pediatrics 300, 304 (1998) ("Children with inflicted and noninflicted TBI had different patterns of neuroimaging, physical, and cognitive findings. Although both groups had negative histories of previous brain injury, signs of pre-existing brain injury . . . were apparent in 40% to 45% of children with inflicted TBI and in none of the children with noninflicted injuries."); Heather T. Keenan, Desmond K. Runyan & Maryalice Nocera, *Child Outcomes and Family Characteristics 1 Year After Severe Inflicted or Noninflicted Traumatic Brain Injury*, 117 Pediatrics 317, 321 (2006); Carla DiScala, Robert Sege et al., *Child Abuse and Unintentional Injuries: A 10-Year Retrospective*, 154 Archives Pediatrics & Adolescent Med. 16 (2000) ("children who were abused developed extensive functional limitations more frequently than those unintentionally injured").

[24] *See* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 164 (4th ed., text rev. 2000) [hereinafter "DSM-IV-TR"] (Dementia Due to Head Trauma). For an explanation of this process in adults, with particular emphasis on physiological and anatomical harm to the brain, see Erin D. Bigler, Carol V. Anderson & Duane D. Blatter, *Temporal Lobe Morphology in Normal Aging and Traumatic Brain Injury*, 23 Am. J. Neuroradiology 255 (2002).

[25] *See, e.g.*, Keenan, Runyan & Nocera, *supra* note 23, at 318 ("Although it was once thought that the plasticity of the infant brain

variety of measures of health,[26] such injuries can produce cognitive impairment, impede learning, and result in reduced measured intelligence.[27]

---

would allow very young children to compensate for injuries, that premise has been brought into question. Surviving children may be faced with lifelong impairments in multiple areas of functioning."); Vicki Anderson, Cathy Catroppa et al., *Functional Plasticity or Vulnerability After Early Brain Injury?*, 116 Pediatrics 1374 (2005) ("Despite the commonly held view that young children's brains are able to adapt to the impact of severe insults, clinical reports indicate that residual problems occur in a range of skills, including intellectual ability, attention, and memory.").

[26] Beth S. Slomine, Melissa L. McCarthy et al., *Health Care Utilization and Needs After Pediatric Traumatic Brain Injury*, 117 Pediatrics 663 (2006) (reporting the damage TBI can inflict and its impact in worsening pre-existing problems). *See generally* Ricardo E. Jorge, *Neuropsychiatric Consequences of Traumatic Brain Injury: A Review of Recent Findings*, 18 Current Opinion in Psychiatry 289 (2005).

[27] *See* American Association on Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Supports* 128-30 (10th ed. 2002). There are strong indications that injuries in the early, formative years of brain development produce more significant and lasting reduction in cognitive functioning and IQ. *See* DSM-IV-TR at 151 (dementia is relatively uncommon among children, but can be caused by head injury). *See generally* Melissa L. McCarthy, Ellen J. MacKenzie et al., *Health-Related Quality of Life During the First Year After Traumatic Brain Injury*, 160 Archives Pediatrics & Adolescent Med. 252, 256 (2006) (reporting that the extent of cognitive impairment correlated with extent of the brain injury). *See, e.g.*, Anderson, Catroppa et al., *supra* note 25, at 1380-81. *But see* Linda Ewing-Cobbs, Marcia Barnes et al., *Modeling Longitudinal Academic Achievement Scores After Pediatric Traumatic Brain Injury*, 25 Developmental Neuropsychology 107, 126-27 (2004) (suggesting more significant reduction for younger TBI victims' academic performance in arithmetical skills than for reading comprehension). This latter result appears consistent with the finding of performance deficits among children with PTSD on a variety of measures, including attention, and abstract reasoning and executive function, but not in language skills or psychomotor speed. Sue R. Beers & Michael D. De Bellis, *Neuropsychological Function in Children with Maltreatment-Related Posttraumatic Stress Disorder*, 159 Am. J. Psychiatry 483, 485 (2002). These differential results appear consistent with the conclusion that the

Childhood brain injuries can also alter the individual's personality both in childhood and in adult life.[28] And these injuries have been strongly statistically correlated with behavioral[29] problems in adulthood,[30] particularly impulsivity,[31] as well as alcohol and drug abuse.[32] Such personality

---

cognitive impact of childhood PTSD involves specific brain functions, rather than merely a generalized diminution in overall performance.

[28] *See, e.g.*, Jeffrey Edwin Max, Brigette Anna Marie Robertson et al., *The Phenomenology of Personality Change Due to Traumatic Brain Injury in Children and Adolescents*, 13 J. Neuropsychiatry & Clinical Neurosciences 161, 164-65 (2001) (reporting, inter alia, increased aggressivity and impaired social judgment in roughly 40% of children studied); Jeffrey E. Max, Harvey S. Levine et al., *Predictors of Personality Change Due to Traumatic Brain Injury in Children and Adolescents Six to Twenty-Four Months After Injury*, 18 J. Neuropsychiatry & Clinical Neurosciences 21, 30 (2006) (reporting the persistence of personality change in childhood and the significance of frontal lobe lesions in the severity of the personality change). *See generally* DSM-IV-TR at 188 (personality change due to head trauma, particularly injury to the frontal lobes).

[29] *See, e.g.*, Michael Sarapata, Douglas Herrmann et al., *The Role of Head Injury in Cognitive Functioning, Emotional Adjustment and Criminal Behavior*, 12 Brain Injury 821 (1998).

[30] *See* Wade C. Myers, Kerrilyn Scott et al., *Psychopathology, Biopsychosocial Factors, Crime Characteristics, and Classification of 25 Homicidal Youths*, 34 J. Am. Acad. Child & Adolescent Psychiatry 1483, 1485 (1995) (reporting that the most frequent medical condition in the subjects' histories was "serious head trauma").

[31] *See* Moeller, Barratt et al., *supra* note 9, at 1785.

[32] *See, e.g.*, Ricardo E. Jorge, Sergio E. Sarkstein et al., *Alcohol Misuse and Mood Disorders Following Traumatic Brain Injury*, 62 Archives Gen. Psychiatry 742 (2006); Michael David Horner, Pamela L. Ferguson et al., *Patterns of Alcohol Use 1 Year After Traumatic Brain Injury: A Population-Based, Epidemiological Study*, 11 J. Int'l Neuropsychol. Soc. 322 (2005); Karen Heffernan, Marylene Cloitre et al., *Childhood Trauma as a Correlate of Lifetime Opiate Use in Psychiatric Patients*, 25 Addictive Behaviors 797 (2000); *cf.* Michael D. De Bellis, *Developmental Traumatology: A Contributory Mechanism for Alcohol and Substance Abuse Disorders*, 27 Psychoneuroendocrinology 155, 158 (2002)

changes in children often constitute clinically recognized mental illness, and the mental illness, as well as its behavioral consequences, can endure into adulthood.

Mental illness that results from traumatic brain injury may show up in the immediate aftermath of the injury.[33] In other cases, the symptoms do not manifest themselves until some years later.[34] And while other psychiatric disorders are strongly associated with brain injury, particularly affective disorders like major depression,[35] the strongest correlation may be with posttraumatic stress disorder (PTSD).[36] The American Psychiatric Association defines PTSD as:

(indicating that adult victims of child abuse with mental illness may use alcohol to alleviate psychiatric symptoms).

[33] *See, e.g.*, Jeffrey E. Max, Donald A. Robin et al., *Traumatic Brain Injury in Children and Adolescents: Psychiatric Disorders at One Year*, 10 J. Neuropsychiatry 290 (1998).

[34] *See* Daryl Fujii & Iqbal Ahmed, *Characteristics of Psychotic Disorder Due to Traumatic Brain Injury: An Analysis of Case Studies in the Literature*, 14 J. Neuropsychiatry & Clinical Neurosciences 130, 131 (2002) and sources cited therein (reporting that a majority of TBI subjects who developed psychotic symptoms experienced delayed onset).

[35] *See, e.g.*, Ricardo E. Jorge, Robert G. Robinson et al., *Major Depression Following Traumatic Brain Injury*, 61 Archives Gen. Psychiatry 42 (2004) (reporting strong relationship to major depression and the occurrence of aggressive behavior), and sources cited therein.

[36] Amanda E. Guyer, Joan Kaufman et al., *Behavioral Alterations in Reward System Function: The Role of Childhood Maltreatment and Psychopathology*, 45 J. Am. Acad. Child & Adolescent Psychiatry 1059, 1060 (2006); Michael D. De Bellis, *Developmental Traumatology: The Psychobiological Development of Maltreated Children and Its Implications for Research, Treatment, and Policy*, 13 Development & Psychopathology 539, 541 (2001) ("Chronic PTSD symptoms may provide the mechanisms for the pervasive psychopathology seen in maltreated children."); *see* Robert van Reekum, Tammy Cohen & Jenny Wong, *Can Traumatic Brain Injury Cause Psychiatric Disorders?*, 12 J. Neuropsychiatry & Clinical Neurosciences 316, 323-24 (2000); Jorge, *supra* note 26, at 292.

> [T]he development of characteristic symptoms following exposure to an extreme traumatic stressor involving direct personal experience of an event that involves actual or threatened death or serious injury, or other threat to one's physical integrity; or witnessing an event that involves death, injury, or a threat to the physical integrity of another person; or learning about unexpected or violent death, serious harm, or threat of death or injury experienced by a family member or other close associate.

DSM-IV-TR at 463.[37] It is now clear that children can and do suffer from PTSD.[38]

Recent studies have made clear that the phenomenon of PTSD in children has a physical manifestation. For example, in a widely cited study, researchers compared the MRI brain images of children who had experienced abuse-related PTSD with those of a control group. The study found that "subjects with maltreatment-related PTSD had smaller intercranial, cerebral, and prefrontal cortex volumes, prefrontal cortical white matter and right temporal lobe volumes" when compared to non-abused control subjects.[39] In addition, stressors

---

[37] "For children, sexually traumatic events may include developmentally inappropriate sexual experiences without threatened or actual violence or injury. Witnessed events include, but are not limited to, observing the serious injury or unnatural death of another person due to violent assault, accident, war, or disaster or unexpectedly witnessing a dead body or body parts. . . . The disorder may be especially severe or long lasting when the stressor is of human design (e.g., torture, rape). The likelihood of developing this disorder may increase as the intensity of and physical proximity to the stressor increase." DSM-IV-TR at 464. (The DSM's classification number for PTSD is 309.81.)

[38] *See, e.g.*, Michael S. Scheeringa, Charles H. Zeanah et al., *Two Approaches to the Diagnosis of Posttraumatic Stress Disorder in Infancy and Early Childhood*, 34 J. Am. Acad. Child & Adolescent Psychiatry 191 (1995).

[39] Michael D. De Bellis, Matcheri S. Keshavan et al., *Brain Structures in Pediatric Maltreatment-Related Posttraumatic Stress Disorder: A*

in the lives of children have also been observed and measured in children's limbic systems and in abnormalities in their EEGs.[40]

The damage caused by PTSD can be directly relevant to questions involving mitigation in capital cases[41] and can be crucial in helping jurors understand a defendant's behavior that may otherwise be inexplicable. Even more importantly, an understanding of PTSD can assist members of the jury in recognizing a defendant's actions as a consequence of a

---

Sociodemographically Matched Study, 52 Biological Psychiatry 1066, 1070 (2002); *see id.* at 1073 ("The positive correlations between intracranial and cerebral volumes with age of onset of PTSD trauma and negative correlations with duration of PTSD trauma suggests that traumatic childhood experiences may adversely influence brain development."). The researchers also found gender differences in the impact of PTSD in children. "Our findings may suggest that boys may be more vulnerable to the effects of severe stress on brain development than girls. This vulnerability may lead to decreased adult resilience. Thus, being male may constitute a neurobiologic risk marker for stress-related vulnerability for adverse brain development during childhood." *Id.* at 1075. *But see* Meena Vythilingam, Christine Heim et al., *Childhood Trauma Associated with Smaller Hippocampal Volume in Women with Major Depression*, 159 Am. J. Psychiatry 2072 (2002). A more recent study found abuse-related size differences in the cerebellum. Michael D. De Bellis & Maragatha Kuchibhatla, *Cerebellar Volumes in Pediatric Maltreatment-Related Posttraumatic Stress Disorder*, 60 Biological Psychiatry 697 (2006).

[40] Teicher, Andersen et al., *supra* note 15, at 404; *see also* Yutaka Ito, Martin H. Teicher et al., *Preliminary Evidence for Aberrant Cortical Development in Abused Children: A Quantitative EEG Study*, 10 J. Neuropsychiatry & Clinical Neurosciences 298 (1998).

[41] The list of the "constellation of symptoms" that are "more commonly seen in association with an interpersonal stressor (e.g., childhood sexual or physical abuse, domestic battering)" includes "impaired affect modulation; self-destructive and impulsive behavior; . . . social withdrawal; feeling constantly threatened; impaired relationships with others; [and] a change from the individual's previous personality characteristics." DSM-IV-TR at 465.

serious mental disorder. This knowledge is beyond the ken of the average juror and would dispel the false impression of a different, criminal motivation.

The developmental consequences of physical abuse of a child extend beyond the specific physical results of traumatic brain injury. Abundant evidence also shows that the nature of a physically abusive relationship can have lasting adverse consequences on the child later in life. It is now widely accepted that a relationship characterized by physical abuse disrupts and distorts the child's cognitive, emotional, and social development.[42]

Severe Neglect

Like traumatic brain injury, severe neglect can stunt the neurological development of children and negatively affect

---

[42] "Abuse diminishes the social and emotional support necessary for accomplishing the major developmental milestones in children's lives." Suzanne Salzinger, Richard S. Feldman et al., *The Effect of Physical Abuse on Children's Social and Affective Status: A Model of Cognitive and Behavioral Processes Explaining the Association*, 13 Development & Psychopathology 805 (2001).

Of course, not every child who suffers abuse manifests the same psychopathology and behavioral consequences. *See generally* Jean Marie McGloin & Cathy Spatz Widom, *Resilience Among Abused and Neglected Children Grown Up*, 13 Development & Psychopathology 1021, 1035 (2001) (reporting 22% of the sample of abused children did not manifest the mental health and behavioral consequences "despite the major stresses and risk posed by their earlier childhood experiences," and noting that there was somewhat greater incidence of resilience among females in the sample than among males). Factors that produce this atypical result in a minority of abuse victims are not fully understood. *See generally* Ann S. Masten, Jon J. Hubbard et al., *Competence in the Context of Adversity: Pathways to Resilience and Maladaptation from Childhood to Late Adolescence*, 11 Development & Psychopathology 143 (1999).

their functioning and behavior as adults.[43] The emotional and developmental harm suffered by children who are subjected to grave neglect has long been recognized in the clinical literature.[44] Recent studies have made clear that the resulting damage to such children can extend beyond emotional responses.[45] Neglected children experience substantially delayed cognitive development, and deficits in both academic achievement and IQ.[46]

---

[43] Child neglect is defined as "failure to act on the part of a parent or caretaker, which results in death, serious physical or emotional harm" or "an act or failure to act which presents an imminent risk of serious harm." 42 U.S.C. § 5106(g) (2000). It is estimated that child neglect constitutes roughly 60% of the reported cases of child abuse. U.S. Department of Health and Human Services, *Child Maltreatment 2002: Reports from the States to the National Child Abuse and Neglect Data System* xiv (2002).

[44] *See, e.g.*, Henry Dwight Chapin, *Systematized Boarding Out vs. Institutional Care for Infants and Young Children*, 105 N.Y. Med. J. 1009, 1011 (1917); Harry T. Chugani, Michael E. Behen et al., *Local Brain Functional Activity Following Early Deprivation: A Study of Post-Institutionalized Romanian Orphans*, 14 Neuroimage 1290 (2001) (reporting dramatic effects revealed by MRI imaging); Michael Rutter, Lucie Andersen-Wood et al., *Quasi-Autistic Patterns Following Severe Early Global Privation*, 40 J. Child Psychology & Psychiatry 537 (1999) (Romanian orphanages); Wayne Dennis, *Children of the Crèche* (1973) (Lebanese orphanage). *See also* DSM-IV-TR at 128 ("Extreme neglect—and especially institutional care with limited opportunities to form selective attachments—increases the risk of developing [Reactive Attachment Disorder].").

[45] "[T]he child exposed to chaotic or threatening caregiving develops a sensitized stress-response system that affects arousal, emotional regulation, behavioral reactivity, and even cardiovascular regulation. These sensitized children are at risk for stress-induced neuropsychiatric problems later in life." Perry & Pollard, *supra* note 6, at 40 (citations omitted).

[46] Cynthia M. Perez & Cathy Spatz Widom, *Childhood Victimization and Long-Term Intellectual and Academic Outcomes*, 18 Child Abuse & Neglect 617, 626 (1994) ("child abuse and neglect represent significant risk factors for poor long-term intellectual and academic outcomes"); *id.*

Severely neglected children are also at increased risk for substantial mental illness.[47] While some of the mental illness traces to purely psychological causes, the evidence strongly indicates that many of the mental health symptoms and learning problems associated with child neglect arise from the biological effects of stress.[48] "Disruptions of experience-dependent critical neurochemical signals during early life may lead to major abnormalities or deficits in neuro-development. Disruption of critical neuro-developmental cues can result from (1) lack of sensory experience during sensitive periods (e.g., neglect) or (2) atypical or abnormal patterns of necessary cues due to extremes of experience (e.g., traumatic stress)."[49]

Sexual and Emotional Abuse

Similarly, emotional and sexual abuse of children can have lasting, and tragic, consequences. The harms of sexual abuse are well documented.[50] But modern research is revealing that the same neurobiological processes that render traumatic brain injuries and severe neglect so damaging to children can

---

at 624 ("the decreased intellectual functioning observed in the abused and/or neglected subjects in young adulthood remained significant despite controls for economic status and other variables"); *see id.* at 630-32 (citing to clinical literature). *See also* Kaplan, Pelcovitz & Labruna, *supra* note 18, at 1216; Shanta R. Dube, Vincent J. Felitti et al., *The Impact of Adverse Childhood Experiences on Health Problems: Evidence from Four Birth Cohorts Dating Back to 1900*, 37 Preventive Medicine 268 (2003).

[47] *See, e.g.*, DSM-IV-TR at 96 (parental neglect, rejection, and other forms of abuse may predispose children for conduct disorder).

[48] De Bellis, *supra* note 7, at 155-64.

[49] Perry, *supra* note 12, at 87 (citation omitted).

[50] *See, e.g.*, Cheryl Lanktree, John Briere & Lisa Zaidi, *Incidence and Impact of Sexual Abuse in a Child Outpatient Sample: The Role of Direct Inquiry*, 15 Child Abuse & Neglect 447 (1991); Angela Brown & David Finkelhor, *Impact of Child Sexual Abuse: A Review of the Research*, 99 Psychological Bulletin 66 (1986).

also result from sexual abuse.[51] As with other forms of child abuse, the damaging effects of sexual abuse are not always immediately apparent; sometimes they only appear months or years later.[52] Predicting which children will have such delayed reactions, known as "sleeper effects,"[53] has proven difficult.[54] Sometimes the damage goes undetected until the individual becomes an adult.

While our society now widely recognizes the harm caused by sexual abuse of children, there is, perhaps, a tendency to minimize the consequences of sustained, severe verbal abuse and other forms of substantial psychological injury. But particularly when it accompanies other types of abuse, verbal abuse can have comparably serious consequences for the child. For example, one study found that "[c]ombined exposure to verbal abuse and witnessing of domestic violence

---

[51] Christine Heim, D. Jeffrey Newport et al., *Altered Pituitary-Adrenal Axis Responses to Provocative Challenge Tests in Adult Survivors of Childhood Abuse*, 158 Am. J. Psychiatry 575 (2001); *see* Frank W. Putnam & Penelope K. Trickett, *Psychobiological Effects of Sexual Abuse: A Longitudinal Study*, 821 Annals N.Y. Acad. Sci. 150, 157-58 (1997); Dong, Anda et al., *supra* note 4, at 633-35 (reporting results consistent with neuropsychiatric studies of other forms of abuse).

[52] "When evaluated with standard instruments, up to 40% of sexually abused children may present with few or no symptoms. A number of reasons have been offered including the possibility that asymptomatic children had minor abuse, that they are more resilient, or that they have a coping style that masks their distress." Putnam, *supra* note 20, at 274 (citations omitted). *See also* Karen J. Saywitz, Anthony P. Mannarino et al., *Treatment for Sexually Abused Children and Adolescents*, in *Annual Progress in Child Psychiatry and Child Development* 455, 457 (Margaret E. Hertzig & Ellen A. Farber eds., 2003).

[53] Putnam, *supra* note 20, at 274.

[54] Jennifer Tebbutt, Heather Swanston et al., *Five Years After Child Sexual Abuse: Persisting Dysfunction and Problems of Prediction*, 36 J. Am. Acad. Child & Adolescent Psychiatry 330, 337-38 (1997) (family environment and abuse-related variables have not proven to be good predictors of long-term mental problems).

was associated with extraordinarily large adverse effects, particularly on dissociation. This finding is consonant with studies that suggest that emotional abuse may be a more important precursor of dissociation than is sexual abuse."[55]

Mental Illness and Disability Resulting from Abuse

The physiological effects of child abuse are often permanent and can continue into adulthood, with serious consequences for perception, functioning, and behavior. The persistence of the effects of childhood abuse is well-documented in the area of mental illness.[56] This is particularly true for PTSD. "Even if childhood trauma does not result in childhood PTSD, it increases the risk for adult PTSD and adult psychiatric illness."[57] An all-too-frequently encountered pattern is that of individuals who had been abused as children later committing acts of abuse as adults.[58]

Another consequence of childhood abuse or traumatization can be a reduction in the individual's intellectual abilities and intelligence. The clearest and most obvious example is when the child suffers a traumatic brain injury during the de-

---

[55] Martin H. Teicher, Jacqueline A. Samson et al., *Sticks, Stones, and Hurtful Words: Relative Effects of Various Forms of Childhood Maltreatment*, 163 Am. J. Psychiatry 993, 997 (2006); *see also id.* at 998 ("Combined exposure to different categories of abusive experiences often equaled or exceeded the impact of exposure to familial sexual abuse. This is of great importance as it suggests that combined exposure to less blatant forms of abuse may be just as deleterious as the most egregious acts we confront.").

[56] *See* Kaplan, Pelcovitz & Labruna, *supra* note 18, at 1217-18.

[57] De Bellis, *supra* note 36, at 543 (citations omitted); *see* Anda, Felitti et al., *supra* note 15, at 180.

[58] *See* Katherine C. Pears & Deborah M. Capaldi, *Intergenerational Transmission of Abuse: A Two-Generational Prospective Study of an At-Risk Sample*, 25 Child Abuse & Neglect 1439 (2001). *See generally* De Bellis, Broussard et al., *supra* note 4.

velopmental period.[59] A brain injury during development can adversely affect the child's ability to learn and process information.

Modern research has confirmed the perhaps less obvious conclusion that the same sort of reduced intellectual ability can result from non-physical injury, such as PTSD.[60] The physical character of this reduced cerebral ability is shown in studies that demonstrate that children who suffer PTSD during key developmental periods may, as a result, actually have smaller brain mass.[61] In some cases, the impact of PTSD can be identified in physical imaging of the individual's brain.[62]

---

[59] *See* Boris Birmaher & Daniel T. Williams, *30 Acquired Brain Disorders*, in *Child and Adolescent Psychiatry: A Comprehensive Textbook* 371-72 (Melvin Lewis ed., 2d ed. 1991). *See generally* McCarthy, MacKenzie et al., *supra* note 27, at 256 (reporting that the extent of cognitive impairment correlated with extent of the brain injury).

[60] *See* Joshi, Daniolos & Salpekar, *supra* note 13, at 842; Perez & Widom, *supra* note 46, and sources cited therein.

[61] *See, e.g.*, Victor G. Carrion, Carl F. Weems et al., *Attenuation of Frontal Asymmetry in Pediatric Posttraumatic Stress Disorder*, 50 Biological Psychiatry 943, 948 (2001) ("Our results indicate that children with a history of exposure to trauma and with resulting posttraumatic stress symptoms had significantly smaller total brain and cerebral volumes than an age- and gender-matched healthy control group."); J. Douglas Bremner, *Long-Term Effects of Childhood Abuse on Brain and Neurobiology*, 12 Child & Adolescent Psychiatric Clinics N. Am. 271, 279 (2003) (reporting several studies finding reduced hippocampal volume (areas involving new learning and memory) in the brains of abused children). *See also* De Bellis, Keshavan et al., *supra* note 20, at 1278-79; Kaufman & Charney, *supra* note 18, at 462 ("the children and adolescents with PTSD were found to have smaller intracranial and cerebral volumes than matched controls, increased right, left, and total lateral ventrical volume; and decreased volume of the medial and posterior portions of the corpus callosum") (citation omitted).

[62] Beers & De Bellis, *supra* note 27, at 483.

A defendant's history of child abuse and any resulting mental problems are exactly the kind of evidence that jurors could find powerfully mitigating. This evidence helps explain why a defendant acted as he did. But there is nothing about it that categorically demonstrates that the defendant is less likely to be dangerous in the future. Indeed, jurors might well conclude that the neurological permanence of the injury could make it *more* likely that the defendant would re-offend. Therefore the question about future dangerousness is not an adequate vehicle for evaluating the *mitigating* significance of a defendant's mental condition.

III. EVIDENCE OF A CAPITAL DEFENDANT'S MENTAL ILLNESS ALSO CONSTITUTES A TWO-EDGED SWORD.

Just as mental illness that results from child abuse is a mitigating factor that is beyond the effective reach of jurors under the Texas system, so, too, is a defendant's mental illness, regardless of its etiology or age of onset.

The mitigating significance of mental illness is well-established. The relevance of mental illness is reflected in the fact that virtually all states that list statutory mitigating factors include a defendant's mental condition as a mitigating circumstance. *Penry v. Lynaugh*, 492 U.S. at 337 (opinion of O'Connor, J.). Nonetheless, Texas jurors are faced with the conundrum of how to consider its true mitigating effect within the confines of the question about prospective dangerousness.

Evidence of a defendant's mental illness may well be deemed relevant to his future dangerousness, but it may be seen as relevant because it renders him *more* dangerous, rather than less.

Public perceptions of mental illness change over time, but the change is not unidirectional. While there appears to be a

somewhat greater general public acceptance of people with mental illness in recent decades, it has not been accompanied by reduced fear of the dangerousness they may be thought to pose. Indeed, the available evidence suggests that the fear of future dangerousness from people with mental illness, particularly psychotic conditions, has actually *increased.*[63]

The fear, often exaggerated fear,[64] that jurors may harbor about the effect of a defendant's mental illness on his future dangerousness surely makes evidence of that illness just the kind of two-edged sword that the special issues cannot reasonably be thought to accommodate.

Nor can mental illness be equated with a defendant's youth in the context of a prediction about future dangerousness. A central attribute of a defendant's young age is that he will

---

[63] Jo C. Phelan, Bruce G. Link et al., *Public Conceptions of Mental Illness in 1950 and 1996: What Is Mental Illness and Is It to be Feared?*, 41 J. Health & Social Behav. 188, 202 (2000) ("Perceptions that such people are dangerous increased nearly two and a half times since 1950 to a point that, in 1996, nearly one-third of respondents spontaneously volunteered the idea that psychotic persons may be violent."); *see also* Bernice A. Pescosolido, John Monahan et al., *The Public's View of the Competence, Dangerousness, and Need for Legal Coercion of Persons with Mental Health Problems*, 89 Am. J. Pub. Health 1339, 1341 (1999) ("Americans continue to discriminate among different types of mental health problems regarding dangerousness. However, levels of concern are high."); Patrick W. Corrigan & Amy E. Cooper, *Mental Illness and Dangerousness* 165-79 (Patrick W. Corrigan ed., American Psychological Association 2005). On the role of media portrayals in shaping public perceptions, see Otto F. Wahl, *Media Madness: Public Images of Mental Illness* 56-86 (1995).

[64] For a more realistic assessment, see Jeffrey W. Swanson, *Mental Disorder, Substance Abuse, and Community Violence: An Epidemiological Approach*, in *Violence and Mental Disorder: Developments in Risk Assessment* 101-36 (John Monahan & Henry J. Steadman eds., 1994).

predictably and inevitably get older.[65] The characteristics of mental illnesses are quite different. While mental illnesses differ from one another, their alleviation is seldom predictably inevitable. Our scientific and clinical understanding of the recurring, and sometimes intractable, nature of many forms of mental illness is growing.[66] That increased knowledge can help us treat many patients more effectively, and it also helps us understand more fully why some of them commit otherwise inexplicable criminal acts. But it does not, by itself, automatically reassure us about their future condition or actions.

Although the public's fears about prospective dangerousness are often exaggerated, we cannot expect jurors to give fair consideration to mental health evidence if they can only express their understanding of its mitigating role in defendant's criminal acts by deciding that the defendant represents no future danger.

---

[65] *See Johnson v. Texas*, 509 U.S. at 368 ("the signature qualities of youth are transient").

[66] In recent years, researchers have come to appreciate the substantial role that physical causes play in the etiology of many mental illnesses. As recently as a few decades ago, leading texts treated that role as inconsequential. *See, e.g.*, C. Knight Aldrich, *An Introduction to Dynamic Psychiatry* 29-30 (1966) ("The possibility of an exclusively physical cause for psychiatric illness is appealing to both physician and patient. . . . So far, however, the evidence for a physical cause or even a major physical causative factor is rather skimpy in most psychiatric illness and virtually nonexistent in many others."). Scientific advances in brain imaging, psychopharmacology, and other fields have made clear that physical causes are far more significant than previously believed. *See, e.g.*, Joseph T. Coyle & Steven E. Hyman, *The Neuroscientific Foundations of Psychiatry*, in *Textbook of Psychiatry* 3-33 (Robert E. Hales, Stuart C. Yudofsky & John A. Talbott eds., 3d ed. 1999); Michael R. Trimble, *Biological Psychiatry* (2d ed. 1996); James G. Hollandsworth, Jr., *The Physiology of Psychological Disorders: Schizophrenia, Depression, Anxiety, and Substance Abuse* (1990); Gelder, Gath et al., *supra* note 17, at 84-103.

CONCLUSION

For the reasons set forth above, *amici* urge this Court to reverse the judgment of the Fifth Circuit.

Respectfully submitted,

Of Counsel

STEPHEN K. HARPER
29 NW 9th Street
Miami Shores, FL 33150

JAMES W. ELLIS *
CAROL M. SUZUKI
NORMAN C. BAY
STEVEN K. HOMER
APRIL LAND
1117 Stanford, NE
Albuquerque, NM 87131
(505) 277-2146

* Counsel of Record

Counsel for *Amici Curiae*

APPENDIX

The American Academy of Child and Adolescent Psychiatry (AACAP) is a non-profit organization whose membership includes over 7,400 child and adult psychiatrists. Established in 1953, the AACAP is the leading national medical association dedicated to treating the myriad mental, behavioral, and developmental disorders suffered by an estimated seven to twelve million American youth. The AACAP strives to improve the quality of life of the children and families subjected to these disorders by providing universal access to care for all children and adolescents, expanding research programs for prevention and treatment of mental illness, and providing other integrated services that meet the needs of the affected children and their families in a community setting. The AACAP is committed to protecting the well-being and rights of the children and families whose lives are affected by these disorders.

The American Association on Intellectual and Developmental Disabilities (AAIDD) was formerly known as the American Association on Mental Retardation (AAMR), and under that name has appeared as *amicus curiae* in this Court in numerous cases. Founded in 1876, AAIDD is the nation's oldest and largest interdisciplinary organization of professionals and other persons who work exclusively in the field of intellectual disabilities. AAIDD promotes progressive policies, sound research, effective practices, and human rights for people with intellectual and developmental disabilities.

The Arc of the United States (formerly known as the Association for Retarded Citizens of the United States), through its 875 state and local chapters, is the largest national voluntary organization in the United States devoted solely to the welfare of the more than seven million children and adults with mental retardation and their families.

Mental Health America (formerly known as the National Mental Health Association) was founded in 1909, and is the country's leading nonprofit organization dedicated to helping people live mentally healthier lives. With more than 320 affiliates nationwide, MHA's membership consists of both mental health professionals and lay citizens concerned about mental health issues.

The National Alliance on Mental Illness (NAMI) is the nation's leading grassroots organization dedicated to improving the lives of persons with severe mental illnesses, including schizophrenia, bipolar disorder (manic-depressive illness), major depression, obsessive-compulsive disorder, and severe anxiety disorders. NAMI strongly opposes the death penalty for people with severe, biologically-based mental illnesses.

Supreme Court, U.S.
FILED
NOV 27 2006
OFFICE OF THE CLERK

Nos. 05-11284, 05-11287

In The Supreme Court of the United States

JALIL ABDUL-KABIR,

Petitioner,

v.

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division.

BRENT RAY BREWER,

Petitioner,

v.

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division.

On Writs Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF CHILD WELFARE LEAGUE OF AMERICA, JUVENILE LAW CENTER AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

JEFFREY J. POKORAK,
Counsel of Record
SUFFOLK UNIVERSITY
LAW SCHOOL
120 Tremont Street
Boston, MA 02108-4977
(617) 305-1645

MARSHA LEVICK
MIA CARPINIELLO
RIYA SHAH
JUVENILE LAW CENTER
1315 Walnut Street, Suite 400
Philadelphia, PA 19107
(215) 625-0551

Counsel for Amici Curiae

[Additional Counsel Listed On Inside Cover]

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

PAMELA HARRIS
Co-Chair, Amicus Committee
NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
1625 I Street NW
Washington, D.C. 20006
(202) 383-5386

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 4

I. EVIDENCE OF A DISRUPTED CHILDHOOD OR ADOLESCENCE – INCLUDING EVIDENCE OF CHILD ABUSE, NEGLECT, DOMESTIC VIOLENCE, AND MENTAL ILLNESS – IS RELEVANT MITIGATING EVIDENCE AS TO PUNISHMENT IN A CAPITAL CASE 4

II. THE LINK BETWEEN THE HARM CAUSED BY CHILDHOOD ABUSE AND TRAUMA AND SUBSEQUENT ANTISOCIAL OR CRIMINAL BEHAVIOR IS REFLECTED IN FEDERAL AND STATE LAWS 12

III. JURORS MUST BE GIVEN A VEHICLE FOR EXPRESSING THEIR REASONED MORAL RESPONSE TO RELEVANT MITIGATING EVIDENCE OF YOUTHFUL VICTIMIZATION 18

A. Jurors' Widely Held Notion that Childhood Abuse and Trauma Are Often Catalysts for Adult Acts of Violence Is Reflected in Popular Literature, Films, Television and Music 19

B. The Fifth Circuit's Continued Restrictions on the Type of Evidence Deemed "Relevant" to the Capital Sentencing Decision Violate this Court's Precedents 25

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002) 17, 18

Ayers v. Belmontes, ___ U.S. ___, 127 S.Ct. 469 (2006) 27

Boyde v. California, 494 U.S. 370 (1990) 27

Brewer v. Dretke, 442 F.3d 273 (5th Cir. 2006) 26

Brewer v. Dretke, No. 05-11287 (May 30, 2006) 2

California v. Brown, 479 U.S. 538 (1987) 8, 27

Cole v. Dretke, 418 F.3d 494 (5th Cir. 2005) 2

Cole v. Dretke, 443 F.3d 441 (5th Cir. 2006) 25, 27

Commonwealth of Pennsylvania ex rel. Sullivan v. Ashe, 302 U.S. 51 (1937) 5

Davis v. Scott, 51 F.3d 457 (5th Cir. 1995) 26

Eddings v. Oklahoma, 455 U.S. 104 (1982) 6, 8, 28, 29

Hitchcock v. Dugger, 481 U.S. 393 (1987) 7

Johnson v. Texas, 509 U.S. 350 (1993) 6

Lockett v. Ohio, 438 U.S. 586 (1978) ..... 6, 7 ,8

Monge v. California, 524 U.S. 721 (1998) 1

New Jersey v. T.L.O., 469 U.S. 325 (1985) 25

Penry v. Johnson, 532 U.S. 782 (2001) 3, 8, 9, 29, 30

Penry v. Lynaugh, 492 U.S. 721 (1998) ..... *passim*

Robertson v. Cockrell, 325 F.3d 243 (5th Cir. 2003) 26

Roper v. Simmons, 543 U.S. 551 (2005) 10, 11

Saffle v. Parks, 494 U.S. 484 (1990) 27

TABLE OF AUTHORITIES – Continued

Page

Santosky v. Kramer, 455 U.S. 745 (1982) 5

Skipper v. South Carolina, 476 U.S. 1 (1986) 28, 29

Smith v. Cockrell, 311 F.3d 661 (2002) 26

Smith v. Texas, 543 U.S. 37 (2004) 25

Strickland v. Washington, 466 U.S. 668 (1984) 1

Tennard v. Dretke, 542 U.S. 274 (2004) 3, 25, 26, 29

Williams v. Taylor, 529 U.S. 362 (2000) 9

Woodson v. North Carolina, 428 U.S. 280 (1976) 5

STATUTES

Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, *et seq.*, 120 Stat. 587, 615 (2006) 16, 17

Child Abuse Prevention and Treatment Act, 42 U.S.C. 5101 *et seq.* 12

Keeping Children and Families Safe Act of 2003, Pub. L. 108-36 Sec. 114 14

OR. REV. STAT. § 419B.005(3)(t) 15

OR. REV. STAT. § 419B.010 15

TEX. [FAM.] CODE ANN. § 261.101(a) 15

TEX. CODE CRIM. PROC. ANN. art. 37.07 3

Victims of Child Abuse Act of 1990, Pub. L. No. 101-647, § 226 (c)(1), 104 Stat. 4789, 4806 (1990) 16

W. VA. CODE § 49-6A-2 15

W. VA. CODE § 49-6A-7 15

TABLE OF AUTHORITIES – Continued

Page

RULES

FED. R. EVID. 401 25

LEGISLATIVE MATERIALS

133 CONG. REC. H4283-02 (daily ed. June 8, 1987) (statement of Rep. Owens) 13

134 CONG. REC. E10334-02 (daily ed. April 12, 1988) (statement of Rep. Goodling) 13

134 CONG. REC. H1439-05 (daily ed. April 12, 1988) (statement of Rep. Lloyd) 13, 14

134 CONG. REC. H1439-05 (daily ed. April 12, 1988) (statement of Rep. Owens) 13, 14

134 CONG. REC. S3468-02 (daily ed. March 30, 1988) (statement of Sen. Thurmond) 13

H.R. REP. NO. 93-247 (1974), *reprinted in* 1974 U.S.C.C.A.N. 2763, 2765 12

MISCELLANEOUS

A NIGHTMARE ON ELM STREET (New Line Cinema 1984) 20

Abbe Smith, *The "Monster" in All of Us: When Victims Become Perpetrators*, 38 SUFFOLK U.L. REV. 367 (2005) 19, 21

ALICE SEBOLD, THE LOVELY BONES (Little, Brown & Company 2002) 22

ANTWONE FISHER (Twentieth Century Fox 2002) 21

TABLE OF AUTHORITIES – Continued

Page

Attorney General John Ashcroft, Prepared Remarks at the Annual Symposium on Domestic Violence (October 29, 2002) 4

Buffy the Vampire Slayer: Welcome to the Hellmouth (WB television broadcast, May 10, 1997) 24

Child Welfare League of America, Press Release, *CWLA Calls for Federal Law to Make All Members of Congress Mandatory Reporters of Child Abuse and Neglect*, Oct. 3, 2006 16

GOOD WILL HUNTING (Miramax 1997) 20, 21

John Harlow, *Throw Off Your Anoraks and Rejoice*, N.Y. TIMES, January 11, 2004 24

Katherine Winfield & Rodney Albert, *Breaking the Link Between Child Maltreatment and Juvenile Delinquency*, CHILDREN'S VOICE, Child Welfare League of America, Mar. 2001 12

Lost: What Kate Did (ABC television broadcast, Nov. 30, 2005) 21

Lost: Outlaws (ABC television broadcast, Feb. 16, 2005) 24

LUCINDA WILLIAMS, *He Never Got Enough Love, on* SWEET OLD WORLD (Chameleon Records 1992) 23

MARTIN MCDONAGH, THE PILLOWMAN: A PLAY (Faber & Faber 2004) 22, 23

MONSTER (Columbia Pictures 2003) 21

MYSTIC RIVER (Warner Bros. 2003) 21

PSYCHO (Paramount Pictures 1960) 20

SLEEPERS (Warner Bros. 1996) 21

TABLE OF AUTHORITIES – Continued

Page

STAR WARS EPISODE I – THE PHANTOM MENACE (Twentieth Century Fox 1999) 20

Stephen Holden, Film Review: *A Director And His Hero Find Answers In the Details*, N.Y. TIMES, December 19, 2002 21

Tom Williams, *Sadistic Tale of Storytelling Shocks us to the Core*, CHICAGO CRITIC.COM, September 23, 2006 23

TONI MORRISON, BELOVED (Alfred A. Knopf, Inc. 1987) 22

U.S. Department of Health and Human Services, Child Welfare Information Getaway, *About CAPTA: A Legislative History*, Dec. 2004 12

W.H. AUDEN, *September 1, 1939*, *in* COLLECTED POEMS 86 (Edward Mendelson ed., 1991) 19

BRIEF FOR THE CHILD WELFARE LEAGUE OF AMERICA, JUVENILE LAW CENTER AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

The Child Welfare League of America, Juvenile Law Center and National Association of Criminal Defense Lawyers respectfully submit this brief as *amici curiae* in support of petitioners, Jalil Abdul-Kabir and Brent Ray Brewer.[1]

INTEREST OF *AMICI CURIAE*

This Court has observed that "capital proceedings [must] be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding." *Monge v. California*, 524 U.S. 721, 732 (1998) (quoting *Strickland v. Washington*, 466 U.S. 668, 704 (1984)). *Amici* believe that this goal of fairness and accuracy can best be achieved through the presentation of all relevant information – including that associated with adverse events and aspects of a defendant's childhood and adolescence – for full consideration by the fact finders in capital cases. The statements of *amici curiae* Child Welfare League of America, Juvenile Law Center, and National Association of Criminal Defense Lawyers are attached at Appendix A.

SUMMARY OF ARGUMENT

This Court's Eighth Amendment jurisprudence is characterized by a central unifying idea: that a capital sentencing jury's decision must reflect a "reasoned moral response" to the offender and his offense. To ensure such a response, this Court has required that the jury have

---

[1] In accordance with Supreme Court Rule 37.6, undersigned counsel certifies that no counsel for any party authored, in whole or in part, any aspect of this brief. Further, no person or entity, other than *amici curiae*, made a monetary contribution to the preparation or submission of this brief.

discretion to consider the defendant's mitigating evidence as it bears on his personal culpability. *See Penry v. Lynaugh*, 492 U.S. 721 (1998) (*Penry I*).

One category of evidence plainly relevant to that determination is that which chronicles abuse, neglect, violence and mental illness during childhood and adolescence. Both Mr. Abdul-Kabir[2] and Mr. Brewer[3] presented such evidence to the jury in mitigation of sentence. However, the former Texas capital sentencing statute, under which both petitioners were sentenced, made no mention of mitigating evidence and did not advise the sentencing jury to decide whether death was the appropriate sentence in light of all the evidence presented. Instead, the jury in the case of each petitioner was restricted to narrow determinations regarding the "deliberateness" of the

---

[2] *See Cole v. Dretke*, 418 F.3d 494, 500 (5th Cir. 2005). At his trial, Jalil Abdul-Kabir (*né* Ted Calvin Cole) introduced evidence of his traumatic background. The court below found that Cole had had "a very rough, rugged childhood," "a bad, very painful background," and that he "never felt loved or worthwhile in his life." *Id.* Other evidence introduced at trial included: (1) Cole's mother was an alcoholic who was unable to care for her children; (2) Cole's father deserted the family when Cole was five years old, dropping Cole off a block from where he thought Cole's mother lived, never to be heard from again; (3) Cole's mother then moved with her children to her parents' home; (4) Cole's grandparents were alcoholics who did not want the children to live with them; (5) Cole was placed in a children's home at the age of five; (6) during Cole's five years in the home, his mother visited him only twice; and (7) Cole's father never visited him at the home. *Id.*

[3] *See* Petition for Writ of Certiorari, *Brewer v. Dretke*, No. 05-11287, at 3-4 (May 30, 2006). Brent Ray Brewer introduced evidence of extensive childhood abuse at the hands of his father, who suffered from Post-Traumatic Stress Disorder due to his military service during the Vietnam War. *Id.* Brewer presented evidence that he did not know his father until he was fifteen years old, and that he and his mother were abused by him. *Id.* He was beaten by his father with various objects, including the butt of a pistol and a flashlight. *Id.* Three months before the incident for which Brewer was prosecuted for murder, he was involuntarily committed to a psychiatric hospital in response to suicide threats. *Id.* It was there he met his co-defendant who managed to control and manipulate him. *Id.*

defendant's acts and the likelihood that the defendant would be a further danger to society.[4]

Abuse of and violence against children and adolescents is understood to occasion great harm on developing youth. This understanding is reflected in the capital jurisprudence of this Court; the actions of the federal and state legislatures; and in the literature, film, and music in our culture. The potential harm from victimization in youth is understood to increase the chances that a person so damaged may act out violently as an adult, as opposed to others who do not share a similar experience in childhood or adolescence. Such a cycle of violence is both aggravating, in that it makes an individual more likely to be dangerous in the future, and mitigating, as it offers a well-understood explanation for behavior that other violent actors cannot claim.

The Fifth Circuit has again misinterpreted the Court's capital jurisprudence as expressed in *Penry I*, *Penry v. Johnson*, 532 U.S. 782 (2001) (*Penry II*) and *Tennard v. Dretke*, 542 U.S. 274 (2004). These cases, taken together, indicate that the jury in a capital case must be allowed an adequate vehicle for consideration of such relevant mitigating evidence. Because no such procedure existed in the capital sentencing trials of Mr. Abdul-Kabir and Mr. Brewer, their sentences of death cannot be considered an

---

[4] *See* TEX. CODE CRIM. PROC. ANN. art. 37.071. ("Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment . . . [o]n conclusion of the presentation of the evidence, the court shall submit the following issues to the jury: (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result; (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.").

accurate or fair determination of their appropriate punishments.

ARGUMENT

I. EVIDENCE OF A DISRUPTED CHILDHOOD OR ADOLESCENCE – INCLUDING EVIDENCE OF CHILD ABUSE, NEGLECT, DOMESTIC VIOLENCE, AND MENTAL ILLNESS – IS RELEVANT MITIGATING EVIDENCE AS TO PUNISHMENT IN A CAPITAL CASE.

> *[W]hen families are wracked by violence and abuse, values are corrupted. The messages transmitted by parents are messages of violence, cruelty, and powerlessness. . . . **Domestic violence damages children.** Thousands of children have been scarred by violence in their homes. Sometimes they are terrified witnesses of abuse; and sometimes they are the victims. But always, these children absorb messages of violence. And all too often, these messages are transmitted to the next generation. Violence begets violence, and the cycle of domestic abuse continues, generation after generation.*
>
> – Attorney General John Ashcroft[5]

This Court well understands the long-lasting harm that may result from adverse conditions in a young person's formative years:

> A stable, loving homelife is essential to a child's physical, emotional, and spiritual well-being. It requires no citation of authority to assert that children who are abused in their youth generally face extraordinary problems developing into responsible, productive citizens. The same can be said of children who, though not physically or emotionally abused, are passed from one foster

---

[5] Prepared Remarks, Annual Symposium on Domestic Violence (October 29, 2002) (transcript available at http://www.usdoj.gov/ovw/nac/agremarks.htm).

> home to another with no constancy of love, trust, or discipline.

Santosky v. Kramer, 455 U.S. 745, 788 (1982) (Rehnquist, J., dissenting).

Youth and adolescence are the times in life when personalities are formed, values are instilled, and character is shaped. When the home environment is a place of uncertainty and terror rather than one of stability and guidance, a person's development is severely impaired, and individuals can understandably suffer the ill effects of such a disrupted development phase long into adulthood. Should a child so harmed during youth end up in trouble with the law as an adult, the evidence of such a disrupted childhood or adolescence – including evidence of child abuse, neglect, domestic violence, and mental illness – is unquestionably relevant mitigating evidence as to punishment. The mitigating value of such evidence flows from the understanding that a youngster so harmed may be more likely to act out in an antisocial way as an adult, and is therefore less morally culpable for the criminal act than a person who did not suffer such harm at others' hands. The mitigating value of such evidence is powerful whether it relates to an attempt to understand a young person's substance abuse, or the root causes of a capital murder.

This Court has long recognized that sentencing determinations require "consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender." *Commonwealth of Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51, 61 (1937). This is never more true than in a capital case, because the irreversible nature of the death penalty requires that it be imposed only if, during the sentencing process, convicted persons are considered as "uniquely individual human beings." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion).

The accuracy of a sentence of death is dependent on procedures that ensure that jurors in capital cases must take into consideration the "character and record of the

individual offender and the circumstances of the particular offense." *Id.* The procedures that insure the consideration of the unique aspects of a person charged with a capital offence are a "constitutionally indispensable part of the process of inflicting the penalty of death." *Id.*; *see also Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion) ("The nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence.").

In *Lockett*, this Court discussed the mitigating value of evidence of youth *qua* youth. *See Lockett,* 438 U.S. 586. In striking down the Ohio sentencing statute as unconstitutional, the Court held that under that scheme, "consideration of a defendant's comparatively minor role in the offense, *or age*, would not generally be permitted, as such, to affect the sentencing decision." *Id.* at 610 (emphasis added). *See also Johnson v. Texas*, 509 U.S. 350 (1993) (presenting issue whether the unadorned special issues adequately allowed jurors to consider mitigating evidence of youth *qua* youth).

However, this Court has held that it is not simply a question of relative youth or age that is relevant to the sentencing decision in a capital case. Rather, the formative events and aspects of a capital defendant's childhood and adolescence are also evidence relevant to the question of the appropriate punishment. For example, in *Eddings v. Oklahoma*, 455 U.S. 104 (1982), this Court reversed the sentence of death based on the sentencer's refusal to consider such aspects of Mr. Eddings' youth:

> Eddings was a youth of sixteen years at the time of the murder . . . . The trial judge recognized that youth must be considered a relevant mitigating factor. But youth is more than a chronological fact. *It is a time and condition of life when a person may be most susceptible to influence and to psychological damage.* . . . . Just as the chronological age of a minor is itself a relevant mitigating factor of great weight, *so must the background*

> *and mental and emotional development of a youthful defendant be duly considered in sentencing.*

Id. at 115-116 (emphasis added).

Additionally, the Court noted that "youth crime as such is not exclusively the offender's fault; offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America's youth." *Id.* at 115 n.11. By acknowledging the collective responsibility of society for the development of youth, the Court recognized that without intervention or an external support system, such young people may well be burdened with an inability to grow into mature, law-abiding adults. Such impaired young people are released from dysfunctional homes into a difficult and confusing world, unable to adjust to the demands of everyday life, and in possession of a skewed perspective formed by years of maltreatment.

Evidence of abuse and neglect during a person's formative years is exactly the kind of evidence this Court has traditionally viewed as potentially mitigating. For example, the petitioner in *Hitchcock v. Dugger* introduced mitigating evidence to show that:

> [A]s a child [he] had the habit of inhaling gasoline fumes from automobile gas tanks; that he had once passed out after doing so; that thereafter his mind tended to wander; that [he] had been one of seven children in a poor family . . . [and] that his father had died of cancer. . . .

Hitchcock v. Dugger, 481 U.S. 393, 397 (1987). A unanimous Court held that because some of Hitchcock's mitigating evidence had fallen outside the scope of the items on the former statutory list, his sentencing "did not comport with the requirements of . . . *Lockett*," and therefore resentencing was required. *Id.* at 399.

Following *Hitchcock*, this Court decided *Penry I,* in which it held that the former Texas capital sentencing scheme – the very same procedure employed at the trials of both Mr. Abdul-Kabir and Mr. Brewer – provided a constitutionally inadequate vehicle for jurors to consider

and give effect to Penry's mitigating evidence of mental retardation and severe childhood abuse. *Penry I*, 492 U.S. 302; *see also Penry II*, 532 U.S. at 797 (describing "give effect to" language of *Penry I* as "the key" to that decision). Johnny Paul Penry was mentally retarded, having been diagnosed with organic brain damage as a child. *Penry I*, 492 U.S. at 307. The Court found that Penry's brain damage may have been caused by beatings and multiple injuries to his brain at an early age. *Id.* at 308-309. In addition, Penry's sister testified that their mother had frequently beaten Penry over the head with a belt when he was a child, and that he was routinely locked in his room without access to a toilet for long periods of time. *Id.* at 309. Penry was in and out of a number of state schools and hospitals until his father removed him from state schools altogether when he was 12. *Id.* Even the State's psychiatrist testified that Penry "had a very bad life" and had been "socially and emotionally deprived." *Id.* at 309-310.

In striking down the application of the unadorned Texas sentencing structure in Mr. Penry's case, the Court explained that "underlying *Lockett* and *Eddings* is the principle that punishment should be directly related to the personal culpability of the criminal defendant." *Id.* at 319. The Court continued:

> If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that *defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.*"

Id. (emphasis added) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987)). The Court held that, "in the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of Penry's mental retardation and abused background by declining to impose the death penalty . . . the jury was not provided

with a vehicle for expressing its 'reasoned moral response' to that evidence in rendering its sentencing decision." *Id.* at 328. Thus, the case was remanded for resentencing to ensure that "the death penalty will [not] be imposed in spite of factors that may call for a less severe penalty." *Id.*[6]

The presentation of evidence regarding the negative aspects of a defendant's childhood and adolescence often serves as a central aspect of the argument for a sentence of life rather than death. For example, in *Williams v. Taylor*, 529 U.S. 362 (2000), the Court reversed Mr. Williams' death sentence based in part on the fact that his attorneys failed to investigate and present substantial mitigating evidence during the sentencing phase of his trial. The omitted evidence included a description of mistreatment, abuse, and neglect during Williams' early childhood. *Williams*, 529 U.S. at 391-392. Had his attorneys done a proper investigation, the jury would have heard that "Williams' parents had been imprisoned for the criminal neglect of Williams and his siblings,[7] that Williams had

---

[6] *See also Penry II*, 532 U.S. at 804. In *Penry II*, the Court again addressed the Texas sentencing scheme and once again found it deficient, this time due to an inadequate supplemental jury instruction. *Id.* The Court held that

> [t]he mechanism created by the supplemental instruction . . . inserted 'an element of capriciousness' into the sentencing decision, 'making the jurors' power to avoid the death penalty dependant on their willingness' to elevate the supplemental instruction over the verdict form instructions. (citations omitted). There is, at the very least, 'a reasonable likelihood that the jury . . . applied the challenged instruction in a way that prevent[ed] the consideration of Penry's mental retardation and childhood abuse. (citation omitted). The supplemental instruction therefore provided an inadequate vehicle for the jury to make a reasoned moral response to Penry's mitigating evidence.

Id. at 800.

[7] *Williams*, 529 U.S. at 395 n.19. Juvenile records contained the following description of Williams home: "The home was a complete wreck. . . . There were several places on the floor where someone had had a bowel movement. Urine was standing in several places in the

(Continued on following page)

been severely and repeatedly beaten by his father, that he had been committed to the custody of the social services bureau for two years during his parents' incarceration (including one stint in an abusive foster home), and then, after his parents were released from prison, had been returned to his parents' custody." *Id.* at 395. After hearing the additional evidence developed in the post-conviction proceedings, the judge who presided at Williams' trial and who had previously determined that the death penalty was "just" and "appropriate," concluded that there existed "a reasonable probability that the result of the sentencing phase would have been different" if the jury had heard that evidence. *Id.* at 396-397.

More recently, this Court held in *Roper v. Simmons*, 543 U.S. 551 (2005), that the Constitution precludes the execution of juveniles. Justice Kennedy, writing for the majority, noted that juveniles "have less control, or less experience with control, over their own environment . . . [t]heir own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment." *Roper*, 543 U.S. at 569-570. Thus, this Court recognized that juveniles are less blameworthy for failing to escape their unfortunate situations. Those same children who were unable to escape negative influences as children and who were subjected to those influences throughout their formative years may well grow up lacking the skills to mature into self-restraining and law abiding citizens.

In *Roper*, the Court also grappled with the difficulty in differentiating between "the juvenile offender whose crime

---

bedrooms. There were dirty dishes scattered over the kitchen, and it was impossible to step any place on the kitchen floor where there was no trash. . . . The children were all dirty and none of them had on underpants. Noah and Lula were so intoxicated, they could not find any clothes for the children, nor were they able to put the clothes on them. . . . The children had to be put in Winslow Hospital, as four of them, by that time, were definitely under the influence of whiskey." *Id.*

reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Roper*, 543 U.S. at 573. The Court noted the professional standards "forbidding psychiatrists from diagnosing any patient under 18 as having antisocial personality disorder . . . which is characterized by callousness, cynicism, and contempt for the feelings, rights, and suffering of others." *Id.* These juveniles whom psychiatrists are reluctant to label as "antisocial" by virtue of their age are the very individuals that may later go on to commit crimes. Their inability to deal with societal demands does not always evaporate by virtue of a few more years of experience. In fact, additional negative life experiences can solidify the antisocial behavior, which then becomes a permanent aspect of these adults' personalities. Because abused, neglected and disabled children often remain incapable of escaping those negative influences as adults, their crimes are more understandable – and are therefore worthy of lesser punishment – as the product of the harm they suffered when young.

II. THE LINK BETWEEN THE HARM CAUSED BY CHILDHOOD ABUSE AND TRAUMA AND SUBSEQUENT ANTISOCIAL OR CRIMINAL BEHAVIOR IS REFLECTED IN FEDERAL AND STATE LAWS.

> *Americans have a firm resolve when it comes to violent crime. Most favor stiff punishment for the offender, while expressing compassion for the victims of serious crimes. Yet the issue becomes complicated when one considers that many victimizers were once victims themselves. Although most children who endure abuse or neglect grow up healthy and law-abiding, the exceptions yield a disturbing and widespread irony: When a community fails to*

protect a child from harm, it may soon be calling for that young person's head.[8]

Under both state and federal laws, child abuse is considered a serious crime. In 1974, the federal government passed its first law addressing child abuse and neglect, the Child Abuse Prevention and Treatment Act ("CAPTA"), 42 U.S.C. 5101 *et seq.* This Act provides federal funding to states in support of child abuse prevention, assessment, investigation, prosecution, and treatment activities, and also provides grants to public agencies and nonprofit organizations for demonstration programs and projects.[9] CAPTA also sets forth baseline definitions of child abuse and neglect, including both acts and omissions, to guide states in enacting child abuse and neglect reporting laws. In order to receive funding through CAPTA, states must establish a mandatory reporting system for suspected child abuse and set forth minimum punishments for failure to report. Even prior to CAPTA's enactment, almost every state had some system for reporting child abuse or neglect. However, often these reports did not capture incidents of child abuse until after the victim had suffered permanent psychological or physical damage, or even death. *See* H.R. REP. NO. 93-247 (1973), *as reprinted in* 1974 U.S.C.C.A.N. 2763, 2765.

CAPTA has been reauthorized numerous times since 1974. Repeatedly, in Congressional reauthorization hearings, legislators have emphasized the severe effects abuse and neglect have on children as they mature. During the 1988 reauthorization of CAPTA, Senator Strom Thurmond of South Carolina stated, "the growth in reported incidents of child abuse, as well as research suggesting that such

---

[8] Katherine Winfield & Rodney Albert, *Breaking the Link Between Child Maltreatment and Juvenile Delinquency*, CHILDREN'S VOICE, Child Welfare League of America, Mar. 2001, http://www.cwla.org/articles/cv0103breaklink.htm (last visited Nov. 26, 2006).

[9] *See* U.S. Department of Health and Human Services, Child Welfare Information Getaway, *About CAPTA: A Legislative History*, Dec. 2004, http://www.childwelfare.gov/pubs/otherpubs/about.pdf (last visited Nov. 26, 2006).

abuse may have *long-term negative results for both the child and society*, have increased concerns regarding the prevention of child abuse, and treatment for abused children." 134 CONG. REC. S3468-02 (daily ed. March 30, 1988) (statement of Sen. Thurmond) (emphasis added). Another legislator, Representative William Goodling of Pennsylvania, shared this view, citing some of the long-term effects caused by childhood abuse: "[T]hese children are our future. Unless they are helped, *unless the abuse and neglect is stopped, they will be ill prepared to meet the daily challenges of living*. Their self-esteem will be low; they will be at great risk of educational failure; they might become runaways; and *they will probably grow up to be adults who abuse their children*." 134 CONG. REC. E10334-02 (daily ed. April 12, 1988) (statement of Rep. Goodling) (emphasis added).

Many legislators expressed their understanding that children who suffer from abuse and neglect are more likely to act in unlawful ways as they grow older. For example, Representative Major Owens of New York emphasized the need for child abuse prevention to protect children from such a fate: "[I]t is common for abused children to blame themselves for the pain they have suffered. Other children who aren't fortunate enough to receive therapy *go on to become abusers of others as well as themselves and possibly turn to crime*." 133 CONG. REC. H4283-02 (daily ed. June 8, 1987) (statement of Rep. Owens) (emphasis added). Many legislators cited the need for child abuse prevention measures based on the well-established research that shows that children who suffer from abuse in the home are more likely to abuse their own children when they become parents.[10] Representative Lloyd articulated other

---

[10] *See, e.g.*, 134 CONG. REC. H1439-05 (daily ed. April 12, 1988) (statement of Rep. Marilyn Lloyd of Tennessee) ("There is some evidence that children who are abused are more likely than non-abused children to become abusers, creating a cycle of abuse through generations of families."); *Group for Children Aims to Break Cycle of Abuse*, N.Y. TIMES, May, 31, 1987 at Section 1, p. 42, Column 3 ("About 80 percent of batterers grew up in abusive families.") (cited in 133 CONG. REC. H4283-02 (daily ed. June 8, 1987) (statement of Rep. Owens)).

repercussions of child abuse stating, "some victims of child abuse have been found to exhibit physical trauma. Child abuse may manifest itself in both short and long term problems such as emotional and learning disorders, poor school performance, and in suicidal and delinquent behavior." 134 CONG. REC. H1439-05 (daily ed. April 12, 1988) (statement of Rep. Lloyd).

In the most recent reauthorization of CAPTA, consideration of the long-term effects of the harm occasioned by child abuse and neglect led Congress to amend CAPTA to extend the circumstances under which child abuse must be reported. Reports are now required even where child abuse is only reasonably *suspected,* rather than *known. See* Keeping Children and Families Safe Act of 2003, Pub. L. 108-36 Sec. 114 (increasing funding and training opportunities for public education on the role and responsibilities of the child protection system and basis for reporting suspected incidents of child abuse and neglect).

In accord with CAPTA, all fifty states, the District of Columbia, and Puerto Rico have some form of mandatory child abuse and neglect reporting law that specifies mandatory reporters of child maltreatment and dictates the circumstances under which they are to report. These laws typically require persons to report to some type of law enforcement authority or child protection agency when they have reasonable cause to suspect or believe that a child has been abused or neglected, or have knowledge of, or observe a child being subjected to, conditions that would reasonably result in harm to the child. As Representative Owens recognized in 1988, "[c]hild abuse is probably not on the increase necessarily in this country, but the reporting of child abuse is increasing. That is *a sign of the evolution of our society, the fact that we take more seriously these crimes against children.*" 134 CONG. REC. H1439-05 (daily ed. April 12, 1988) (statement of Rep. Owens).

Moreover, many states have broad mandatory reporting statutes that require *all persons* to report child abuse, in lieu of or in addition to requiring certain specified professionals or institutions to report child abuse. For example, Texas requires

"*a person* having cause to believe that a child's physical or mental health or welfare has been adversely affected by abuse or neglect . . . shall immediately make a report." TEX. [FAM.] CODE ANN. § 261.101(a) (emphasis added).[11] Other states only require certain specified individuals – frequently professionals such as social workers, school personnel, health care workers, mental health professionals, child care providers, medical examiners/coroners, and law enforcement officers – or institutions to report child abuse. Yet even in those states with narrower reporting requirements, legislative change is underway. For example, in 2003, Oregon amended its definition of "public and private officials" in its mandatory reporting statute to include legislators among the individuals who must report child abuse. *See* OR. REV. STAT. § 419B.005(3)(t) (including "Member of the Legislative Assembly" in the definition of public or private individual"); *see also* OR. REV. STAT. § 419B.010 (requiring "[a]ny public or private official having reasonable cause to believe that any child with whom the official comes in contact has suffered abuse or that any person with whom the official comes in contact has abused a child shall immediately report or cause a report to be made"). In a similar vein, some states that do not require all persons to report child abuse nevertheless include members of the clergy in their designated group of mandatory reporters, and provide no exception for the clergy-penitent privilege as grounds for failing to report suspected child abuse or neglect. *See, e.g.,* W. VA. CODE § 49-6A-2 ("When any . . . *member of the clergy* . . . has reasonable cause to suspect that a child is neglected or abused or observes the child being subjected to conditions that are likely to result in abuse or neglect, such person shall immediately . . . report the circumstances or cause a report to be made."); W. VA. CODE § 49-6A-7 ("The privileged quality of communications . . . between any professional person and his patient or his client, except that between attorney and client, is hereby abrogated in situations involving suspected or

[11] For additional examples of broad state mandatory reporting statutes that require all persons to report child abuse, see Appendix B.

known child abuse or neglect.").[12] These broad mandatory reporting statutes reflect society's recognition that child abuse reporting is essential to prevent child abuse and protect children from its grave long-term effects.[13]

Additionally, in July 2006, Congress enacted further federal law protections in The Adam Walsh Child Protection and Safety Act of 2006 ("Adam Walsh Act"). The Adam Walsh Act includes several provisions intended to prevent child abuse and to protect children from sexual exploitation and violent crime. This further reflects society's acknowledgment that child abuse has grave harmful effects on children and therefore perpetrators of child abuse should be harshly penalized. In particular, the Act increases current sentences for both the commission of crimes against children and the failure to report abuse. For example, the Act amended 18 U.S.C.A. § 2258 to increase the federal criminal penalty for the failure to report child abuse from a maximum of six months imprisonment (the punishment imposed for a Class B misdemeanor under 18 U.S.C.A. § 3581(b)(7)) to a maximum of one year imprisonment (the punishment imposed for a Class A misdemeanor under 18 U.S.C.A. § 3581(b)(6)) and/or a fine.[14] *See* Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 209,

---

[12] For additional examples of state mandatory reporting statutes that require clergy members to report child abuse and provide no exception for the clergy-penitent privilege, see Appendix C.

[13] *See* Child Welfare League of America, Press Release, *CWLA Calls for Federal Law to Make All Members of Congress Mandatory Reporters of Child Abuse and Neglect*, Oct. 3, 2006, http://www.cwla.org/newsevents/news061003congress.htm (last visited Nov. 26, 2006). At the federal level, in October of 2006, the Child Welfare League of America called for a federal law to require all members of Congress to report child abuse and neglect when they learn of it. *Id.*

[14] 18 U.S.C.A. § 2258 (West 2006). The statute relies on the definition of child abuse set forth in the Victims of Child Abuse Act of 1990, Pub. L. No. 101-647, § 226 (c)(1), 104 Stat. 4789, 4806 (1990), which includes "the physical or mental injury, sexual abuse or exploitation, or negligent treatment of a child."

120 Stat. 587, 615 (2006).[15] The Act also imposes mandatory minimum terms of imprisonment for specific violent crimes against children, including murder, kidnapping, violence resulting in serious bodily injury, and violence with the use of a dangerous weapon. *See id.* § 202 (amending 18 U.S.C.A. § 3559).[16]

In addition to imposing harsher criminal penalties for offenses against children, the Act eliminated statutes of limitation for the prosecution of felony sex offenses involving a minor. *See id.* § 211 (adding 18 U.S.C.A. §§ 3299 & 3281). The Act also makes it easier and more advantageous for victims of certain sex-related crimes against minors to seek civil remedies by revising federal provisions to allow adults as well as minors to sue for injuries and to increase the minimum level of damages from fifty thousand dollars ($50,000) to one hundred fifty thousand dollars ($150,000). *See id.* § 707 (amending 18 U.S.C.A. § 2255).

This Court has stressed that these laws are attempts to address actual harms perpetrated upon children rather than simply criminalizing adult behavior. For example, the Court recognized that the legitimate purpose of child pornography laws is to protect child victims who are exploited and harmed by their participation in the production of pornographic images. In *Ashcroft v. Free Speech*

---

[15] *See also* Pub. L. No. 109-248 § 215 (amending 18 U.S.C.A. § 1153(a) to include the crime of felony child abuse or neglect as a crime punishable within the Indian country).

[16] *See* Pub. L. No. 109-248. The Act increased the mandatory minimum terms of imprisonment and criminal penalties for various sexual offenses against children. Pub. L. No. 109-248 § 203 (amending 18 U.S.C.A. § 2422(b) regarding penalty for coercion and enticement of children to engage in prostitution); Pub. L. No. 109-248 § 204 (amending 18 U.S.C.A. § 2423(a) regarding penalty for transportation of child to engage in prostitution); Pub. L. No. 109-248 § 205 (amending 18 U.S.C.A. § 2242 regarding penalty for sexual abuse), Pub. L. No. 109-248 § 206 (amending 18 U.S.C.A. §§ 2241, 2244, 2245, 2251, 2252, 2252A, 2252B, 2260, 3559 & 3592 regarding penalties for sexual abuse and contact), Pub. L. No. 109-248 § 207 (amending 18 U.S.C.A. § 2243(b) regarding the penalty for sexual abuse of wards), Pub. L. No. 109-248 § 208 (amending 18 U.S.C.A. § 1591(b) regarding mandatory penalties for sex-trafficking of children).

Coalition, 535 U.S. 234 (2002), this Court affirmed a ruling by the United States Court of Appeals for the Ninth Circuit striking the federal Child Pornography Prevention Act of 1996 ("CPPA") as overbroad, in violation of First Amendment free speech rights. CPPA "extend[ed] the federal prohibition against child pornography to sexually explicit images that appear[ed] to depict minors but were produced without using any real children," such as images created by using adults who look like minors or by using computer imaging. *Id.* at 239-240.

The Court struck down the CPPA in part because the "virtual child pornography" images banned by the statute did not involve children in the production process. Therefore, the images were not the product of child sexual abuse that the state had an interest in stamping out without regard to judgment regarding its content. *Id.* at 241. Because no actual children are involved, the images did not record any crime, nor did they create any victims by their production. *Id.* at 250. It is the harmful effect on the children who are exploited in the creation of child pornography that warrants affording child pornography no First Amendment protection. *See, e.g., id.* at 244 ("The sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of decent people.").

III. JURORS MUST BE GIVEN A VEHICLE FOR EXPRESSING THEIR REASONED MORAL RESPONSE TO RELEVANT MITIGATING EVIDENCE OF YOUTHFUL VICTIMIZATION.

Jurors face an extremely serious and difficult decision when determining the appropriate sentence in a capital case. Although the decision is guided by law, it is also dependent upon the facts of the case and the circumstances of the offender. Each juror brings their own experience and understanding regarding human nature to that decision. Part of that understanding includes the accepted concept that victims of childhood violence may become perpetrators of violence as adults. That knowledge of human nature also makes such evidence mitigating, as it suggests a reason for criminal behavior not available to

others who were not so traumatized. Capital sentencing structures must allow jurors an opportunity to express that belief, which is based in society's common experience.

A. Jurors' Widely Held Notion that Childhood Abuse and Trauma Are Often Catalysts for Adult Acts of Violence Is Reflected in Popular Literature, Films, Television and Music.

> *I and the public know*
> *What all schoolchildren learn,*
> *Those to whom evil is done*
> *Do evil in return.*[17]

Before they are seated in the jury box, jurors in capital cases are citizens who access a wide range of historical, societal and cultural information. Media sources that inform and shape jurors' perceptions permeate our society and reflect common wisdom. One such inescapable message that jurors understand before they enter the courthouse is that children who suffer childhood abuse or trauma are more likely to act out violently as adults. This cycle of violence, in which childhood victims of abuse and trauma are transformed into violent adults, is frequently portrayed in popular culture to explain the violent or antisocial behavior of adult characters.

The audience of such portrayals in literature, film, and television – future jurors – are left to decide for themselves whether the characters' violent backgrounds diminish their culpability or make them irretrievably evil. A similar role is performed by the jury in a capital proceeding, where evidence of such childhood abuse can be a two-edged sword. *See Penry I*, 492 U.S. at 324. Such evidence can be seen as both aggravating and mitigating, and it is incumbent on the jurors to properly weigh the relative value of each side of this sword in any given case. Under Texas' former sentencing scheme, jurors

---

[17] W.H. AUDEN, *September 1, 1939*, *in* COLLECTED POEMS 86 (Edward Mendelson ed., 1991) (cited in Abbe Smith, *The "Monster" in All of Us: When Victims Become Perpetrators*, 38 SUFFOLK U.L. REV. 367 (2005) (discussing the "cycle of violence" that transforms victims into perpetrators).

were not given any vehicle for considering the mitigating aspects of evidence demonstrating abuse, neglect and violence during the defendant's youth. Instead, they were required to reduce a multifaceted portrayal of the defendant's life and background to a yes or no answer in response to a question of future dangerousness.

The cycle of violence is often invoked to explain and predict the violent behavior of the protagonists/antagonists in literature, film, television and song lyrics. In suspense and horror films, adult characters who commit violent acts are often depicted as having suffered extremely traumatic childhoods marred by abuse, neglect, and psychological torture.[18]

Not all portrayals of the cycle of violence in film are severe. In *Good Will Hunting*, the protagonist, Will Hunting, is a mathematical genius who is repeatedly incarcerated for his violent and antisocial tendencies. Will is ordered to attend therapy, and through his treatment, he confronts his abusive youth in which he was victimized first by his father and then by his foster father:

> *Will*: My father was an alcoholic. Mean f***in' drunk. Used to come home hammered, looking to whale on someone. So I had to provoke him, so he wouldn't go after my mother and little brother. Interesting nights were when he wore his rings . . . .
>
> * * *

[18] In Alfred Hitchcock's iconic 1960 suspense film, PSYCHO, the main character, Norman Bates, endures years of physical, emotional, and sexual abuse by his mother until he finally kills her and her lover. As an adult, he develops severe psychosis, adopting the persona of his deceased mother and committing three murders. PSYCHO (Paramount Pictures 1960); *see also* A NIGHTMARE ON ELM STREET (New Line Cinema 1984) (Freddy Krueger is conceived by rape and given up for adoption at birth, then is placed in foster care with an abusive alcoholic man who ultimately adopts him. In adulthood, Freddy kills his adoptive father and commits a series of child murders); STAR WARS EPISODE I – THE PHANTOM MENACE (Twentieth Century Fox 1999) (Darth Vader is enslaved as a child, along with his mother. His mother is killed before his eyes and he ultimately turns to "the dark side.").

> *Will (referring to his foster father):* He used to just put a belt, a stick, and a wrench on the kitchen table and say, "Choose."

GOOD WILL HUNTING (Miramax 1997).

In the films described above, the filmmakers depicted acts of violence committed by adults who suffered childhood abuse. Other filmmakers have used childhood abuse as the backdrop for a story of an adult who seeks vengeance against his or her childhood abuser, or a suspected child abuser.[19] In addition, several filmmakers have dramatized the real-life stories of individuals who were abused as children and subsequently engage in violent behavior as adults.[20]

---

[19] *See, e.g.*, MYSTIC RIVER (Warner Bros. 2003) (portraying a man who is sexually abused as a child and who, in adulthood, kills a man who he believes is going to abuse a young child); SLEEPERS (Warner Bros. 1996) (depicting children who were routinely physically and sexually abused by guards in a detention facility and who, in adulthood, seek revenge by murdering one of the guards. *Cf. Lost: What Kate Did* (ABC television broadcast, Nov. 30, 2005) (depicting a woman, Kate, who sets fire to her parents' home, intentionally murdering her alcoholic and physically abusive father).

[20] *See, e.g.*, ANTWONE FISHER (Twentieth Century Fox 2002) (depicting a navy sailor sent to a naval psychiatrist for help after a series of violent outbursts, where he confronts a painful past of abuse at the hands of his foster family.); *see also* Stephen Holden, Film Review: *A Director And His Hero Find Answers In the Details*, N.Y. TIMES, December 19, 2002 ("In one scene the young Antwone, his hands tied, is savagely beaten with a wet dish towel for supposedly dirtying the walls. In another, she menaces the boy with a flaming torch made from a rolled-up newspaper."); MONSTER (Columbia Pictures 2003) (telling the story of Aileen Wournos, a young woman who as a child was neglected and abandoned by her mother, and left in the care of alcoholic grandparents who physically, emotionally, and sexually abused her. After committing a series of minor crimes, Aileen hitchhikes to Florida where she is tried, convicted, and subsequently executed for killing seven men whom she claimed tried to rape her while she was working as a prostitute.); Abbe Smith, *The "Monster" in All of Us: When Victims Become Perpetrators*, 38 SUFFOLK U.L. REV. at 370-73, 382, 393 (focusing on the case of Aileen Wournos; arguing that "people to whom terrible things are done and people who do terrible things . . . are often the same people"; and asserting that "among those who have committed

(Continued on following page)

Like filmmakers, novelists and playwrights also employ the cycle of violence in their exploration of the complicated pasts of their violent characters. Toni Morrison's Pulitzer Prize-winning novel *Beloved* traces the tragic history of an escaped slave named Sethe who is viciously abused, both physically and sexually, during her childhood and adolescence in slavery. When the slave hunters come looking for her, Sethe kills her infant child to prevent her from being sold into slavery, and attempts to kill her other child. TONI MORRISON, BELOVED (Alfred A. Knopf, Inc. 1987). In *The Lovely Bones*, the antagonist, George Harvey, watches three men attack his mother in their home when he is five years old. His mother then takes George to escape and runs over the three attackers, killing them. Shortly afterward, George witnesses his father kill his mother. Seeing these acts of violence provokes a deep hatred of women, and by his mid-30s, George has killed a dozen women and girls. ALICE SEBOLD, THE LOVELY BONES (Little, Brown & Company 2002).

Popular playwright Martin McDonagh has also used the cycle of violence as a theme in his play, *The Pillowman*. In *The Pillowman* the main character, Katurian, is a short story writer whose bizarre stories begin to come true. As a child, Katurian discovers that his brother, Michal, whom he never knew existed, was living in his house and was routinely tortured by his parents. In an effort to save his brother, Katurian smothers his parents with pillows, killing them both. However, the years of torture left Michal

---

serious crime, it is the rare perpetrator who has not also suffered. It is the rare death row inmate whose life does not read like a case study of extreme deprivation and abuse. It is the rare juvenile incarcerated in an adult prison for rape or murder who has had anything other than the cruelest of childhoods . . . [I]t is well documented that [abused and neglected] girls grow up to become the vast majority of women in prison.") (citing Phyllis Crocker, *Feminism and Defending Men on Death Row*, 29 ST. MARY'S L.J. 981, 986-87 (1998); James Garbarino, *Children in Danger: Coping With the Consequences of Community Violence* (1992); and Cathy S. Widom & Michael G. Maxfield, Nat'l Inst. of Justice, *An Update on the Cycle of Violence* (Feb. 2001)).

severely mentally impaired. Many years later when Katurian and Michal are brought to the police station for questioning about a series of murders that mirror Katurian's short stories, Michal confesses to Katurian that he indeed copied Katurian's stories and murdered two children. MARTIN MCDONAGH, THE PILLOWMAN: A PLAY (Faber & Faber 2004).[21]

Songwriters also introduce themes of childhood violence to explain pain and violence in their songs. In her song, *He Never Got Enough Love*, Lucinda Williams depicts the destructive consequences of years of psychological, emotional, and physical child abuse. A young boy is abandoned by his mother at an early age and is left with his alcoholic and abusive father, who routinely verbally and physically abused him. When the child enters adulthood, he takes out his own anger out on a stranger, seeking to prove correct his father's negative perception of him. LUCINDA WILLIAMS, *He Never Got Enough Love, on* SWEET OLD WORLD (Chameleon Records 1992).

Further, television series provide possibly the broadest examples of society's understanding of the cycle of violence. For example, on *Lost*, one of television's most popular series, one of the main characters, Sawyer, is a petty criminal whose past history of child abuse is used to explain his adult behavior. When Sawyer was a child, his mother had an affair with a man who would eventually con Sawyer's family out of their life savings, prompting Sawyer's father to murder his mother and then commit suicide. When Sawyer gets into financial trouble as an adult, he turns to a life of con artistry and murders a man

---

[21] Even the critic who reviewed the play recognized the prevalence of the cycle of violence as a theme: "McDonagh shows that often abused children grow up to be miserable adults. He has Katurian write about a hero, the Pillowman, who offers abused children a way out by enticing them to suicide to spare them a life of despair." Tom Williams, *Sadistic Tale of Storytelling Shocks us to the Core*, CHICAGO CRITIC.COM, September 23, 2006, http://www.chicagocritic.com/html/the_pillowman.html (last visited Nov. 26, 2006).

whom he suspects was his mother's former lover. *Lost: Outlaws* (ABC television broadcast, Feb. 16, 2005).[22]

What jurors learn from the cultural references to which they are exposed every day is that abused children and adolescents may grow up to become violent adults. However, they are often led to understand that, by influence of that trauma and harm in youth, a person so abused in childhood is not as morally culpable for criminal acts as one with no such violent past.

There can be no dispute that such evidence is relevant to the sentencing determination in a capital case. When asked to weigh the option of life or death for these victims of childhood abuse, jurors must be given a vehicle for expressing their decision that a particular act of violence may be the product of a damaged, rather than depraved, psyche. However, Texas' former "special issues" only permit the jurors to give effect to the relevant *aggravating* aspects of such evidence through their answer to the question whether the petitioners probably would constitute a "continuing threat to society." Thus, the instructions effectively require the jurors to interpret all aspects of the evidence of childhood abuse and trauma only as aggravating and foreclose any consideration of the equally compelling mitigating aspects of such evidence.

---

[22] Violent adolescents are also portrayed as victims of childhood abuse on television. The widely popular television series *Buffy the Vampire Slayer* features Buffy Summers, a young woman chosen by fate to hunt and kill vampires. In one episode, Buffy mistakes her classmate, Cordelia, for a vampire. Wielding a makeshift stake, Buffy pushes Cordelia up against the wall. When Buffy sees that she has mistakenly attacked Cordelia, and when she lets her go, Cordelia responds, "God! What's your childhood trauma?" *See Buffy the Vampire Slayer: Welcome to the Hellmouth* (WB television broadcast, May 10, 1997) (transcript available at www.buffyology.com/transcripts/001-1-01-welcometothehellmouth.html); *see also* John Harlow, *Throw Off Your Anoraks and Rejoice*, N.Y. TIMES, January 11, 2004 (describing the quotation regarding childhood trauma as having "entered dictionaries of pop-culture quotations").

B. The Fifth Circuit's Continued Restrictions on the Type of Evidence Deemed "Relevant" to the Capital Sentencing Decision Violate this Court's Precedents.

This Court recently rejected the Fifth Circuit's "constitutional relevance" test, which placed limitations on the consideration of relevant mitigating evidence in the Texas capital sentencing context. *See Tennard*, 542 U.S. 274; *see also Smith v. Texas*, 543 U.S. 37, 43-44 (2004) (rejecting similar "threshold test" for mitigating evidence). In so doing, the Court plainly defined the broad range of mitigating evidence relevant to the question of punishment:

> When we addressed directly the relevance standard applicable to mitigating evidence in *McKoy v. North Carolina*, 494 U.S. 433 (1990), we spoke in the most expansive terms. We established that the "meaning of relevance is no different in the context of mitigating evidence introduced in a capital sentencing proceeding" than in any other context. . . .

Tennard, 542 U.S. at 284 (quoting *McKoy,* 494 U.S. at 440). For mitigating evidence to be considered relevant, it need only have a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *New Jersey v. T.L.O.*, 469 U.S. 325, 345 (1985) (quoting FED. R. EVID. 401). Judge Dennis, dissenting from the denial of the motion for rehearing en banc in Mr. Abdul-Kabir's case, articulated the standard:

> In *McKoy v. North Carolina* . . . , the Court reaffirmed or clearly established that the principle of relevance under Federal Rule of Evidence 401 applies in capital cases and cannot be distorted by the state so as to interfere with the sentencer's full consideration and use of relevant evidence in culpability assessment and sentence selection.

Cole v. Dretke, 443 F.3d 441, 446 (5th Cir. 2006) (citation omitted) (en banc reh'g denied) (Dennis, J., dissenting from denial of reh'g).

Prior to this Court's correction in *Tennard*, however, the Fifth Circuit utilized a test for "constitutional relevance" which it characterized as a "screening test" for mitigating evidence. *Robertson v. Cockrell*, 325 F.3d 243, 251 (5th Cir. 2003).[23] In *Tennard*, this Court stated that the Fifth Circuit's "constitutional relevance" test "has no foundation in the decisions of this Court. Neither *Penry I* nor its progeny screened mitigating evidence for 'constitutional relevance' before considering whether the jury instructions comported with the Eighth Amendment." *Tennard*, 542 U.S. at 284. Not only did the test lack the support of this Court's precedent, but it had the detrimental effect of screening out mitigating evidence that was obviously relevant in a capital sentencing proceeding. *Id.* at 285-86.

Despite this Court's rejection of the "constitutional relevance" test in *Tennard*, the Fifth Circuit continues to employ the functional equivalent of the test in its evaluation of mitigating evidence. This is particularly noticeable in *Brewer* when the lower court, in discussing mitigating evidence presented at Brewer's trial, notes a "constitutional distinction between, on the one hand, 'severe' abuse of the type Penry sustained and, on the other, a 'mere' troubled childhood of the sort Graham experienced." *Brewer v. Dretke*, 442 F.3d 273, 279 n.16 (5th Cir. 2006). The court continued, "there does not appear to be one iota of evidence suggesting either that Brewer's condition is permanent or that he experienced cognitive limitations of any sort as the result of it." *Id.* at 281.

---

[23] The lower court's previous test required a petitioner to show that (1) he had a "uniquely severe permanent handicap" acquired through no fault of his own, and (2) there was a nexus between the offense and the petitioner's "severe permanent condition." *Davis v. Scott*, 51 F.3d 457, 460-61 (5th Cir. 1995), *overruled in part by Tennard*, 542 U.S. at 282-84. As to the first requirement, the Fifth Circuit explicitly stated that the mitigating evidence must relate "either to severe mental retardation or extreme child abuse." *Smith v. Cockrell*, 311 F.3d 661, 680 (2002). The second requirement was a "nexus requirement," calling for a connection between the offense committed and the condition to which the mitigating evidence refers. *Id.* at 680-81.

The Fifth Circuit's resurrection of its "constitutional relevance" test again allows for a closed-door approach to the relevance of mitigating evidence. As Judge Dennis reiterated:

> Cole's moral culpability was a factor of consequence to the outcome of the sentencing proceeding. Cole's evidence of his organic neurological defect, lack of impulse control, and destructive family background was relevant mitigating evidence, as the Cole panel concedes, because it made it more likely that the jury would assess Cole with a lower level of culpability than it would have without that evidence. The panel does not dispute, but tacitly admits, that the State failed to comply with its duty and responsibility to empower and allow the sentencing jury to fully consider and fully give effect to Cole's relevant mitigating evidence by assessing his culpability and selecting his sentence on the basis of that evidence and assessment.

Cole, *supra*, 443 F.3d at 449.

This Court has long held that the statutory means employed to enable jurors to consider mitigating evidence may differ. *See, e.g. Ayers v. Belmontes*, ___ U.S. ___, 127 S.Ct. 469, 472 (2006) (upholding California catchall provision instructing jury to consider "[a]ny other circumstance which extenuates the gravity of the crime" as adequate vehicle for consideration of mitigating evidence).[24] However,

---

[24] In *Belmontes*, the Court reaffirmed its previous holding that States are free to "structure and shape consideration of mitigating evidence," in order to achieve "a more rational and equitable administration of the death penalty." *Boyde v. California*, 494 U.S. 370, 377 (1990). States certainly retain a strong interest in assuring that the sentencer's decision is rational rather than purely emotional or arbitrary. This conclusion is apparent from the types of "structuring" and "shaping" devices this Court has approved; for example, the Court has endorsed instructions requiring the jury to "render its decision on the evidence without sympathy," *Saffle v. Parks*, 494 U.S. 484, 490 (1990) or to avoid the influence of, *inter alia*, "public opinion or public feeling." *Brown*, 479 U.S. at 539. Neither practice circumscribes the

(Continued on following page)

the Court has never approved a system which constrains the admissibility or consideration of mitigating evidence based on harsh relevance standards. Indeed, this Court has always understood that it is the function of the sentencer to determine the weight of evidence and that determination cannot be taken from them by action of the state or courts. For example, in *Eddings*, this Court held that the sentencer is entitled to determine the weight to be given to mitigating evidence in deciding whether a defendant should be sentenced to death. *See Eddings*, 455 U.S. at 113-14 ("The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.").[25]

A similar issue regarding the limitation of relevant evidence was presented in *Skipper v. South Carolina*, 476 U.S. 1 (1986). In that case, the trial judge held that Mr. Skipper's evidence that he would adjust well to prison

---

jury's ability to assess the mitigating significance of the defendant's evidence in a given case. Nor does either rule preclude the jury's ultimate moral judgment that death is an excessively harsh sentence for a particular defendant, in light of his reduced culpability. Indeed, precisely because the sentencer's response should be *reasoned* and *moral*, States may prevent jurors from deciding capital cases on mere whim or sympathy.

[25] In *Eddings*, Justice Powell's opinion for the Court characterized the decision of the Oklahoma Court of Criminal Appeals as holding that Mr. Edding's mitigating evidence was "not relevant." 455 U.S. at 113. Conversely, Justice Powell held that the evidence *was* relevant:

> Nor do we doubt that the evidence Eddings offered was relevant mitigating evidence. Eddings was a youth of 16 years at the time of the murder. Evidence of a difficult family history and of emotional disturbance is typically introduced by defendants in mitigation . . . In some cases, such evidence properly may be given little weight. But when the defendant was 16 years old at the time of the offense there can be no doubt that evidence of a turbulent family history, of beatings by a harsh father, and of severe emotional disturbance is particularly relevant.

Id. at 115.

"would be irrelevant and hence inadmissible." *Id.* at 3. Similarly, the State argued that mitigating evidence of past good conduct in jail was relevant only to establish good character. Thus, it urged the Court to hold that there was no constitutional violation in excluding the evidence proffered to show "future adaptability to prison life." *Id.* at 6-7. The Court rejected those arguments and held that it was improper to exclude the evidence because doing so would violate the rule that the sentencer may not refuse to consider, nor be precluded from considering, any relevant mitigating evidence that the defendant submits in support of a sentence other than death. *Id.* at 7 (citing *Eddings*, 455 U.S. 104). In reaching that conclusion, the Court held:

> The only question before us is whether the exclusion from the sentencing hearing of the testimony petitioner proffered regarding his good behavior during the over seven months he spent in jail awaiting trial deprived petitioner of his right to place before the sentencer relevant evidence in mitigation of punishment. It can hardly be disputed that it did. . . . Although it is true that any such inferences would not relate specifically to petitioner's culpability for the crime he committed, . . . there is no question but that such inferences would be 'mitigating' in the sense that they might serve 'as a basis for a sentence less than death.'

Id. at 4-5.

Based on this Court's decisions, it is clear that evidence of adverse events in childhood, like those suffered by Mr. Abdul-Kabir and Mr. Brewer, is the type of mitigating evidence that is relevant to the capital sentencing determination. Nothing in this Court's decisions supports the Fifth Circuit's continued resistance to *Tennard*, *Penry I*, and *Penry II*. All of those cases proceed from the premise that the sentencing authority must be permitted to consider and give effect to whatever relevant mitigating evidence a capital defendant may present. If such evidence is relevant to the future dangerousness inquiry but is potentially mitigating for other reasons, the "future

dangerousness" special issue alone will not enable the jurors to give full effect to the defendant's mitigating evidence. By definition, in such circumstances, the second special issue will restrict the jury's consideration in a way that does not encompass the full mitigating force of the defendant's evidence. This is certainly the case with evidence that a defendant was a victim of childhood abuse and that he is now, as an adult, a participant in the well-understood cycle of violence.

CONCLUSION

Like the evidence in *Tennard, Penry I*, and *Penry II*, relevant mitigating evidence of adverse events in childhood presented by Mr. Abdul-Kabir and Mr. Brewer was a "two-edged sword" which jurors were only allowed to use to cut against the defendant. Because of this unconstitutional limitation on the consideration of relevant mitigating evidence, the judgments of the court of appeals should be reversed.

Respectfully submitted,

JEFFREY J. POKORAK,
Counsel of Record
SUFFOLK UNIVERSITY
LAW SCHOOL
120 Tremont Street
Boston, MA 02108-4977
(617) 305-1645

PAMELA HARRIS
Co-Chair, Amicus Committee
NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
1625 I Street NW
Washington, D.C. 20006
(202) 383-5386

MARSHA LEVICK
MIA CARPINIELLO
RIYA SHAH
JUVENILE LAW CENTER
1315 Walnut Street
Suite 400
Philadelphia, PA 19107
(215) 625-0551

Counsel for Amici Curiae

APPENDIX A

STATEMENTS OF INTEREST BY *AMICI CURIAE* CHILD WELFARE LEAGUE OF AMERICA, JUVENILE LAW CENTER, AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS:

Child Welfare League of America (CWLA) is an 84-year-old association of more than 1000 public and private child and family-service agencies that collectively serve more than 3 million abused, neglected and vulnerable children and youth every year. Since its inception in 1920, CWLA has been a leader in the development of quality programming, practices and policies in all areas of child welfare and child well-being. In our work with children and youth impacted by the juvenile and criminal justice systems, we have grown increasingly concerned about the link between child maltreatment and juvenile delinquency. CWLA advocates for policies and practices that seek to interrupt the path to criminal offending that is frequently the outcome for victims of child abuse and neglect. Because we know that children and adolescents have less capacity than adults to take care of themselves and make good decisions, we also advocate for policies and practices that recognize these fundamental differences and provide children and adolescents with the supports they need to negotiate the path to adulthood. In all of our work, we strive to ensure that every child and young person is protected from harm, injustice and discrimination and is provided with the opportunity to achieve his or her full potential.

Juvenile Law Center (JLC) is the oldest multi-issue public interest law firm for children in the United States, founded in 1975 to advance the rights and well being of children in jeopardy. JLC pays particular attention to the needs of children who come within the purview

of public agencies – for example, abused or neglected children placed in foster homes, delinquent youth sent to residential treatment facilities or adult prisons, or children in placement with specialized services needs. JLC works to ensure children are treated fairly by systems that are supposed to help them, and that children receive the treatment and services that these systems are supposed to provide. JLC has authored or co-authored many amicus briefs in this Court as well as other state and federal courts concerning the rights of children in the adult criminal justice system, and the importance of considering children's development and experience when sentencing them as adults.

National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia non-profit corporation with a membership of more than 10,000 attorneys nationwide – along with 80 state and local affiliate organizations numbering 28,000 members in fifty states. NACDL was founded in 1958 to promote study and research in the field of criminal law and procedure, to disseminate and advance knowledge of the law in the area of criminal justice and practice, and to encourage the integrity, independence and expertise of defense lawyers in criminal cases in the state and federal courts. Among NACDL's objectives are to ensure that appropriate measures are taken to safeguard the rights of all persons involved in the criminal justice system and to promote the proper administration of justice. In furtherance of its objectives NACDL files approximately 35 *amicus curiae* briefs a year, including at least ten *amicus curiae* briefs in the United States Supreme Court, on a variety of criminal justice issues. *See* NACDL's website at www.nacdl.org.

APPENDIX B

Examples of States With Mandatory Reporting Statutes That Require All Persons to Report Child Abuse, in Lieu of or in Addition to Requiring Certain Specified Professionals or Institutions to Report Child Abuse.

Delaware, DEL. CODE. ANN. tit. 16, § 903 ("*Any other person* who knows or in good faith suspects child abuse or neglect shall make a report") (emphasis added).

Florida, FLA. STAT. § 39.201(1)(a) ("*Any person* who knows, or has reasonable cause to suspect, that a child is abused, abandoned, or neglected . . . shall report such knowledge or suspicion.") (emphasis added).

Idaho, IDAHO CODE ANN. § 16-1605(1) ("*Any . . . other person* having reason to believe that a child under the age of eighteen (18) years has been abused, abandoned or neglected or who observes the child being subjected to conditions or circumstances which would reasonably result in abuse, abandonment or neglect shall report or cause to be reported.") (emphasis added).

Indiana, IND. CODE § 31-33-5-1 ("*An individual* who has reason to believe that a child is a victim of child abuse or neglect shall make a report") (emphasis added).

Kentucky, KY. REV. STAT. ANN. § 620.030 ("*Any person* who knows or has reasonable cause to believe that a child is dependent, neglected or abused shall immediately cause an oral or written report to be made.") (emphasis added).

Maryland, MD. CODE ANN. [FAM. LAW] § 5-705(a)(1) ("*A person* in this State other than a health practitioner, police officer, or educator or human service worker who has

reason to believe that a child has been subjected to abuse or neglect shall" notify) (emphasis added).

Maryland, MD. CODE ANN. [FAM. LAW] § 5-704(a)(1) ("Each health practitioner, police officer, educator, or human service worker, acting in a professional capacity in this State" shall notify).

Mississippi, MISS. CODE ANN. § 43-21-353(1) ("*Any other person* having reasonable cause to suspect that a child is a neglected child or an abused child, shall cause an oral report to be made immediately") (emphasis added).

Nebraska, NEB. REV. STAT. § 28-711 ("When *any . . . other person* has reasonable cause to believe that a child has been subjected to child abuse or neglect or observes such child being subjected to conditions or circumstances which reasonably would result in child abuse or neglect, he or she shall report such incident or cause a report of child abuse or neglect to be made.) (emphasis added).

New Hampshire, N.H. REV. STAT. ANN. § 169-C:29 ("*Any other person* having reason to suspect that a child has been abused or neglected shall report the same") (emphasis added).

New Jersey, N.J. STAT. ANN. § 9:6-8.10 ("*Any person* having reasonable cause to believe that a child has been subjected to child abuse or acts of child abuse shall report.") (emphasis added).

New Mexico, N.M. STAT. § 32A-4-3 ("*Every person . . .* who has information that is not privileged as a matter of law, who knows or has a reasonable suspicion that a child is an abused or a neglected child shall report the matter immediately.") (emphasis added).

North Carolina, N.C. GEN. STAT. § 7B-301 ("*Any person* or institution who has cause to suspect that any juvenile is abused, neglected, or dependent . . . or has died as the result of maltreatment, shall report.") (emphasis added).

Oklahoma, OKLA. STAT. tit. 10 § 7103.A.1 ("*Every . . . other person* having reason to believe that a child under the age of eighteen (18) years is a victim of abuse or neglect, shall report the matter promptly.") (emphasis added).

Rhode Island, R.I. GEN. LAWS § 40-11-3(a) ("*Any person* who has reasonable cause to know or suspect that any child has been abused or neglected . . . or has been a victim of sexual abuse by another child shall, within twenty-four (24) hours, transfer that information to the department for children and their families or its agent.") (emphasis added).

Tennessee, TENN. CODE. ANN. § 37-1-403(a)(1) ("*Any person* who has knowledge of or is called upon to render aid to any child who is suffering from or has sustained any wound, injury, disability, or physical or mental condition shall report such harm immediately if the harm is of such a nature as to reasonably indicate that it has been caused by brutality, abuse or neglect or that, on the basis of available information, reasonably appears to have been caused by brutality, abuse or neglect.") (emphasis added).

Texas, TEX. [FAM.] CODE ANN., § 261.101(a) ("*A person* having cause to believe that a child's physical or mental health or welfare has been adversely affected by abuse or neglect . . . shall immediately make a report.") (emphasis added).

Utah, UTAH CODE ANN. § 62A-4a-403(1) ("*When any person* . . . has reason to believe that a child has been subjected to

incest, molestation, sexual exploitation, sexual abuse, physical abuse, or neglect, or who observes a child being subjected to conditions or circumstances which would reasonably result in sexual abuse, physical abuse, or neglect, he shall immediately notify") (emphasis added).

Wyoming, WYO. STAT. ANN. § 14-3-205(a) ("*Any person* who knows or has reasonable cause to believe or suspect that a child has been abused or neglected or who observes any child being subjected to conditions or circumstances that would reasonably result in abuse or neglect, shall immediately report it.") (emphasis added).

APPENDIX C

Examples of States With Mandatory Reporting Statutes That Require Clergy Members to Report Child Abuse and Provide No Exception for the Clergy-Penitent Privilege.

New Hampshire, N.H. REV. STAT. ANN. § 169-C:32 ("The privileged quality of communication between ... any professional person and his patient or client, except that between attorney and client, shall not apply to proceedings instituted pursuant to this chapter and shall not constitute grounds for failure to report as required by this chapter.").

North Carolina, N.C. GEN. STAT. § 7B-310 ("No privilege shall be grounds for any person ... failing to report that a juvenile may have been abused, neglected, or dependent, even if the knowledge or suspicion is acquired in an official professional capacity, except when the knowledge or suspicion is gained by an attorney from that attorney's client during representation only in the abuse, neglect, or dependency case.").

Oklahoma, OKLA. STAT. tit. 10, § 7103.A.3 ("No privilege or contract shall relieve any person from the requirement of reporting pursuant to this section.").

Rhode Island, R.I. GEN. LAWS § 40-11-11 ("The privileged quality of communication between ... any professional person and his or her patient or client, except that between attorney and client, is hereby abrogated in situations involving known or suspected child abuse or neglect and shall not constitute grounds for failure to report as required by this chapter.").

Texas, TEX. [FAM.] CODE ANN. § 261.101(c) (Texas itself provides that "[t]he requirement to report ... applies without exception to an individual whose personal communications may otherwise be privileged, including ... a member of the clergy.").

West Virginia, W. VA. CODE § 49-6A-7 ("The privileged quality of communications ... between any professional person and his patient or his client, except that between attorney and client, is hereby abrogated in situations involving suspected or known child abuse or neglect").